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No. ____

In The
Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,
Petitioners,

v.

BARACK OBAMA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a federal court exercising its habeas jurisdiction under *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008), may require the Executive to provide 30 days' advance notice of a proposed transfer of these Petitioners—all of whom are concededly *not* enemy combatants—from Guantánamo to another location, where the reach of the Great Writ may be unsettled, in order to provide the court with an opportunity to adjudicate any claims Petitioners may have opposing the transfer, including on the grounds that the transfer will result in continued unlawful detention or torture.

2. Whether the D.C. Circuit erred in creating a circuit split when it held that a federal court may issue an All Writs Act injunction to protect its jurisdiction only when the separate standards for an injunction under Federal Rule of Civil Procedure 65 have also been met.

PARTIES TO THE PROCEEDING

The Petitioners are Jamal Kiyemba, as next friend,[1] Hammad Memet, Abdul Sabour, Khalid Ali and Sabir Osman (collectively "Petitioners").[2]

The Respondents are Barack H. Obama, President of the United States; Robert M. Gates, Secretary of Defense; Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force, Guantánamo Bay, Cuba; and Colonel Bruce E. Vargo, Commander, Joint Detention Operations Group, Joint Task Force, Guantánamo Bay, Cuba.

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[1] Each Petitioner also directly authorized counsel to act in these cases.

[2] Several Petitioners below have since been transferred and are no longer Petitioners in this case: Abdul Nasser, Abdul Semet, Huzaifa Parhat and Jalal Jalaldin were transferred to Bermuda on June 11, 2009 and Edham Mamet was transferred to Palau on October 31, 2009 (Ibrahim Mamet, as next friend to Edham Mamet, is also no longer part of the case). The remaining Petitioners who file this petition for a writ of certiorari are still being held at Guantánamo.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the D.C. Circuit.

DECISIONS BELOW

The opinion of the D.C. Circuit is reported at *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"). App. 1a-35a. The district court's orders are unreported. App. 36a-42a.

JURISDICTION

The Court of Appeals entered judgment on April 7, 2009. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which were denied by majorities of the court on July 27, 2009. App. 43a-46a. On October 23, 2009, Chief Justice Roberts granted Petitioners a 15-day extension to file the instant petition for a writ of certiorari until November 10, 2009. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

Pursuant to Supreme Court Rule 14(1)(f), the relevant provisions of constitutional and statutory law are set forth in the Appendix. App. 47a-49a.

STATEMENT OF THE CASE

This petition raises the fundamental question whether a federal court exercising its habeas jurisdiction may require the Executive to provide 30

days' advance notice of a proposed transfer of persons detained at Guantánamo to a location arguably beyond the reach of the Great Writ, so that the court may have an opportunity to address any claims opposing the transfer before it occurs, including on the basis that the transfer will result in continued unlawful detention or torture. Petitioners respectfully submit that the D.C. Circuit majority decision erred when it held that the district court lacked the power to require the Executive to provide such notice under the court's habeas jurisdiction, the Constitution and the All Writs Act. The majority principally relied on this Court's decision in *Munaf v. Geren*, 553 U.S. __, 128 S. Ct. 2207 (2008), but in the words of the *Kiyemba II* concurrence and dissent: "the *Munaf* petitioners knew in advance that the government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful"—thus "[t]here was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer." App. 33a-34a. *Munaf* also left open the possibility that a federal court might enjoin a transfer in the "extreme case" in which the transfer would more likely than not result in torture. 128 S. Ct. at 2226. This possibility requires that an individual have notice of a proposed transfer in the first instance.

The D.C. Circuit's holdings regarding federal court habeas jurisdiction and the application of the Constitution to detainees at Guantánamo are not subject to a circuit split because all detainee habeas petitions are being litigated in that circuit. However, these issues are undeniably important as evidenced by the fact that identical notice orders to those reversed in this case are pending in more than 150 other cases.

Further, the Executive's statement that it presently seeks to close the Guantánamo facility and transfer all remaining detainees demonstrates that the question of whether a federal court may require notice of a proposed transfer will continue to be a pressing one. In addition, the D.C. Circuit's application of the All Writs Act—apart from its ruling on the habeas and Constitutional issues—created a clear circuit split on whether an injunction under the Act is only proper when the separate standards for an injunction under Federal Rule of Civil Procedure 65 have also been met.

On October 20, 2009, in a case involving each of the Petitioners here, the Court granted certiorari in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) ("*Kiyemba I*"). Although this petition involves the same Petitioners and a federal court's application of habeas jurisdiction and the Due Process Clause, the issues presented by this petition are distinct. The petitioners in *Kiyemba I* argue that where the Executive shows that no other release is feasible and concedes that a petitioner is not an enemy combatant, a habeas judge has the power to order that the petitioner be produced in his courtroom so that he might fashion conditions of release. Petitioners here present the separate question whether a federal court has the power to require the Executive to provide advance notice of any proposed transfer from Guantánamo, so that the court may have an opportunity to address any claims opposing the transfer. If petitioners succeed in *Kiyemba I*, the notice orders at issue in this appeal may be rendered moot as to these Petitioners. However, the important issues in this petition have been, and will continue to be, recurring, including in over 150 other habeas cases in which similar notice orders are at stake. The Court

should grant certiorari so that this critical question can be resolved.

I. Factual And Procedural Background

Petitioners are Uighurs, members of a Muslim minority group from the Xinjiang Uyghur Autonomous Region of far-western China. All parties agree that the Chinese government has violently oppressed the Uighurs for many years. App. 68a.[3] Each Petitioner fled from China to Afghanistan to escape that oppression. *Id.* In 2002, for reasons that the Executive now admits were unjustified, Petitioners were taken into United States military custody in Afghanistan and brought to Guantánamo. App. 69a. Petitioners have been detained at Guantánamo ever since, even after the Government conceded that they were not enemy combatants and should never have been considered as such.[4]

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[3] Certain factual citations are made to the October 9, 2008 decision by the district court (Urbina, J.) in *In re Guantánamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (D.D.C. 2008) (App. 66a-86a), *overruled on other grounds*, *Kiyemba I*, 555 F.3d 1022, *cert. granted*, *Kiyemba v. Obama*, No. 08-1234 (Oct. 20, 2009). Each of the Petitioners here is among the 17 detainees party to that decision, which is the subject of *Kiyemba I*.

[4] *See, e.g.*, *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008) (vacating former Petitioner Parhat's enemy combatant classification); *Abdul Semet, et al., v. Gates*, Nos. 07-1509 through 07-1512 (D.C. Cir. Sept. 12, 2008) (judgments for four other Petitioners); *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d at 38-39 (App. 76a-77a) (each Petitioner's imprisonment is "unlawful").

On July 29, 2005, Petitioners Abdul Sabour, Khalid Ali, Sabir Osman and Hammad Memet filed a petition for a writ of habeas corpus through next friend Jamal Kiyemba in the U.S. District Court for the District of Columbia. SA 250-84.[5] Edham Mamet filed a petition for a writ of habeas corpus through next friend Ibrahim Mamet on August 11, 2005. SA 285-315.[6] Shortly thereafter, Petitioners in both *Kiyemba* and *Mamet* sought orders providing them with 30 days' notice before their transfer out of Guantánamo. SA 34-45, 49-60. In both cases, Petitioners cited their fear of a transfer without notice to China or another country where they would likely be tortured, abused or continue to be unlawfully detained. SA 37, 52. Petitioners demonstrated that they were entitled to an order requiring advance notice of a proposed transfer under the court's habeas jurisdiction, the Constitution and the All Writs Act. SA 34, 42, 49, 57.

Petitioners have a real and ongoing fear of persecution, torture or death if repatriated to China.

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[5] References to "GA" and "SA" are references to the Government's Appendix, submitted with the June 16, 2006 Brief for Appellants (D.C. Cir.), and Supplemental Appendix, submitted with the July 10, 2006 Brief for Appellees/Cross-Appellants (D.C. Cir.), respectively. As noted, five of the nine petitioners present in the decision below were released to Bermuda and Palau on June 11, 2009 and October 31, 2009, respectively.

[6] As noted, Edham Mamet was released to Palau on October 31, 2009, and accordingly is no longer a Petitioner here. Because the district court's ruling in his case is addressed in part by the decision below, it is explained here to provide appropriate context.

SA 39-40, 54-55.[7] Respondents agree that China is more likely than not to persecute, torture or kill Petitioners, and stated in declarations in 2005 that they did not presently intend to transfer them directly back to China. *See, e.g.*, App. 20a n.5. However, Respondents' policy position, as reflected in declarations submitted to the district court in *Mamet* in 2005, GA 99-107, 108-13, is non-binding and subject to unilateral reversal by the Executive without notice. GA 102. In addition, Respondents' declarations expressly leave open the prospect of transfer to a foreign nation that will continue to detain them, including potentially in coordination with or at the behest of the United States or Chinese governments. App. 33a; GA 109.

II. The Decisions Below

A. The District Court's Decisions

The district court in *Kiyemba* and *Mamet* granted the notice orders providing the court and Petitioners with 30 days' notice prior to Petitioners' transfer out of Guantánamo ("Notice Orders"). App. 36a-39a, 40a-42a. In *Kiyemba*, the district court (Urbina, J.) noted its "concern that the government may remove the petitioners from GTMO in the near future, thereby divesting (either as a matter of law or *de facto*) the court of jurisdiction." App. 37a. The district court acted expressly to preserve its habeas jurisdiction and to prevent Respondents from "abus[ing] the processes now put in place for the purpose of adjudicating

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[7] *See also* Edward Wong, *China Executes 9 for Their Roles in Ethnic Riots in July*, N.Y. Times, Nov. 10, 2009, at A12.

matters on their merits" and to "'guard against depriving the processes of justice of their suppleness of adaptation to varying conditions.'" App. 37a-38a (citation omitted). The *Kiyemba* Notice Order directed Respondents "not [to] remove the petitioners from GTMO unless this court and counsel for petitioners . . . receive thirty days' advance notice of such removal." App. 38a.

In *Mamet*, the district court (Huvelle, J.) cited Petitioner Mamet's fears of torture or continued detention if returned to China. App. 41a. While the district court denied Petitioner Mamet's request for a preliminary injunction, it conditioned a stay of the district court's proceedings requested by the Government on the provision of 30 days' prior notice of "any transfer of Mamet to a foreign country." App. 42a. The district court granted the stay pending resolution of the appeals in *In re Guantánamo Bay Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). *See* App. 42a.[8] In granting the Notice Order, the

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[8] Those appeals were ultimately consolidated and addressed in *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008). Following *Boumediene*, the *Kiyemba* and *Mamet* actions pending in the district court were consolidated before Judge Hogan. On July 31, 2008, Judge Hogan issued an order "adopt[ing] the reasoning of those Judges who entered orders requiring notice" and requiring that "in cases in which the petitioner requests such notice, the government shall file notice with the Court 30 days prior to any transfer of a petitioner from Guantanamo Bay, Cuba." App. 64a-65a. It is undisputed that the Notice Orders remained in full force and effect even after the disposition of *Boumediene* by this Court. *See* Supplemental Br. for Appellants, *Kiyemba v. Obama*, Nos. 05-5487 and 05-5489 (D.C. Cir. Aug. 21, 2008)

district court in *Mamet* cited to the Notice Orders issued in both *Kiyemba* and *Deghayes v. Bush*, Civ. No. 04-2215 (RMC) (D.D.C. June 15, 2005). App. 50a-62a. The court in *Deghayes* also ordered the Executive to provide notice of any proposed transfer based upon the All Writs Act, 28 U.S.C. § 1651(a), which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *See* App. 42a.

The Government filed notices of appeal from the portion of the *Kiyemba* order "that prohibits respondents from removing petitioner from Guantanamo unless the Court and any counsel for petitioner receive thirty days' advance notice of such removal," GA 87, and the portion of the *Mamet* order "that requires respondents to provide the Court thirty days' advance notice of any transfer of petitioner Mamet to a foreign country and sets the terms of that notice." GA 92. The *Kiyemba* and *Mamet* appeals were consolidated, along with two other appeals of 30 days' Notice Orders then pending before the D.C. Circuit in *Zakirjan v. Bush*, No. 06-5042 (D.C. Cir.) and *Aladeen v. Bush*, No. 05-5491 (D.C. Cir.).

It bears emphasizing that the Notice Orders were narrowly tailored to require only notice. The Executive was *not* enjoined from effecting a specific transfer, but required only to provide Petitioners and the district court with 30 days' notice, at which point Petitioners would have the opportunity to raise any

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(attempting to distinguish *Boumediene* and arguing that Notice Orders should be vacated).

objections. When the Executive sought to transfer the petitioners in *Zakirjan* and *Aladeen* to Albania in November 2006, both petitioners were provided notice under Notice Orders like those at issue here, and neither objected to the transfer. The Orders imposed no practical impediment to their transfer.[9]

Underscoring the importance of this petition, the district court entered identical or similar Notice Orders in approximately 150 habeas cases brought by Guantánamo detainees that were similarly appealed by the Executive and are currently pending before the D.C. Circuit. *See* Supplemental Br. for Appellants, *Kiyemba v. Obama*, Nos. 05-5487 and 05-5489 (D.C. Cir. Aug. 21, 2008).

B. The D.C. Circuit's Decision

Oral argument in the consolidated appeals was first held on September 11, 2006. Prior to issuing a decision, the court dismissed the appeals in light of the D.C. Circuit's decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), which, prior to its reversal by this Court, held that the Military Commissions Act had stripped habeas jurisdiction over claims brought by Guantánamo detainees. When this Court granted certiorari, *Boumediene v. Bush*, 553 U.S. __, 128 S. Ct. 2229 (2008), the D.C. Circuit recalled the mandate in the Notice Orders appeals and stayed the proceedings pending this Court's resolution of *Boumediene*. On

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[9] Likewise, recent events underscore the lack of any burden that the Notice Orders place on the Executive. Most of the original *Kiyemba II* Petitioners have been successfully transferred either when they waived the notice periods or after the proposed transfers were already made public.

June 12, 2008, this Court issued its decision in *Boumediene* reversing the D.C. Circuit and holding that Congress did not strip Petitioners' right to assert habeas claims. *Id.* at 2247-59. After that decision, the D.C. Circuit ordered supplemental briefing in the Notice Orders appeals and held additional argument.

On April 7, 2009, the D.C. Circuit issued its decision as reported in *Kiyemba II*. *Kiyemba II* unanimously held that under *Boumediene* the district court had habeas jurisdiction over claims relating to the proposed transfer of detainees from Guantánamo. App. 5a-6a. Notwithstanding such jurisdiction, the panel majority interpreted *Munaf*, 128 S. Ct. 2207—which this Court issued the same day as *Boumediene*—to preclude a district court from giving notice to Petitioners of their proposed transfer so that they would have an opportunity to assert any such claims. App. 13a-14a. *Kiyemba II* rejected Petitioners' arguments that common law habeas jurisdiction has long included a court's power to provide an opportunity for a petitioner to challenge an unlawful transfer to a location potentially outside the jurisdiction of the court. *Kiyemba II* also did not accept that Petitioners were entitled under due process to notice and an opportunity to be heard before their life and liberty interests were impaired. The *Kiyemba II* majority further concluded that the All Writs Act, 28 U.S.C. § 1651, had no independent force to support the Notice Orders if Rule 65's requirement of "likelihood of success on the merits," among other things, was not met. In so holding, the D.C. Circuit directly split with the Eleventh Circuit's decision in *Klay v. United Healthgroup, Inc.*, that "[t]he requirements for a traditional [Rule 65] injunction *do not apply* to injunctions under the All Writs Act because the

historical scope of a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." 376 F.3d 1092, 1100 (11th Cir. 2004) (emphasis added).

The *Kiyemba II* concurrence and dissent (Griffith, J.) concurred as to jurisdiction, but otherwise dissented from the panel majority because it found *Munaf* inapposite: "the *Munaf* petitioners knew in advance that the government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful"—thus "[t]here was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer." App. 33a-34a. The dissent further observed that "I do not believe *Munaf* compels absolute deference to the government on this matter" and that the "premise of *Boumediene* requires that the detainees have notice of their transfers and some opportunity to challenge the government's assurances." App. 27a. Moreover, the dissent identified at least three elements critical to the holding in *Munaf* that are not present here: 1) "the need to protect Iraq's right as a foreign sovereign to prosecute the petitioners"; 2) "Iraq's status as an ally and the fact that the petitioners had voluntarily traveled to Iraq to commit crimes during ongoing hostilities"; and 3) the "unique type of relief" sought by the *Munaf* petitioners, namely shelter from a sovereign government that sought to prosecute those petitioners for alleged crimes committed within its borders. App. 34a.

Petitioners sought rehearing of *Kiyemba II* and a stay of the mandate from the D.C. Circuit, which were denied by majority votes.

III. The Court's Grant Of Certiorari In *Kiyemba I*

On October 20, 2009, this Court granted certiorari in *Kiyemba I*, No. 08-1234, a separate petition arising from the habeas proceedings of these and additional Uighur petitioners. That petition arose specifically from a district court order, following the Government's concession that the petitioners are not "enemy combatants," directing that petitioners be brought to the courtroom for the fashioning of release conditions. *See In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008) (App. 86a). The D.C. Circuit reversed, *Kiyemba I*, 555 F.3d 1022, and this Court granted certiorari to review the decision.

Here, as noted, Petitioners who are also present in the *Kiyemba I* case seek this Court's review of the separate question of whether a federal court exercising its habeas jurisdiction has the power to require 30 days' advance notice of a proposed transfer of a detainee by the Executive out of Guantánamo, in order to provide the district court with the opportunity to determine whether the transfer will result in continued unlawful detention or torture in a location arguably beyond the reach of the Great Writ.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's "Blank Check" To The Executive In Transferring Individuals Out Of Guantánamo Raises Important And Recurring Habeas And Constitutional Issues

A. The Great Writ Has Historically Provided Courts With The Authority To Prevent Unlawful Transfers

This Court has repeatedly determined that lower court decisions granting the Executive unchecked authority with respect to the treatment of detainees raise fundamental issues of the separation of powers and thus merit the Court's review.[10]

Here, the D.C. Circuit granted the Executive unreviewable power in transferring detainees without notice out of Guantánamo, a location to which this Court has confirmed the reach of the Great Writ. *See, e.g., Boumediene*, 128 S. Ct. at 2266, 2274. Without such notice, Petitioners may be suddenly transferred

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[10] *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."); *id.* at 525 (habeas corpus is a "critical check" on the Executive); *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) ("[F]ederal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.").

to an unidentified location where the reach of the Great Writ may be uncertain, and have no opportunity to challenge the transfer on the grounds that it will result in continued unlawful detention or torture. Thus, a crucial principle is at stake here: whether the judiciary in exercising habeas jurisdiction has any role in checking Executive action concerning individuals who have been detained at Guantánamo since 2002. Given the Executive's public statements that it is closing Guantánamo, the specific questions concerning notice of proposed transfers have been, and will continue to be, recurring.

The Court has long recognized that notice and judicial inquiry into the legality of a prisoner's transfer is a fundamental component of habeas review of Executive action. *See In re Bonner*, 151 U.S. 242, 254-62 (1894) (prisoner who is transferred to unauthorized prison is entitled to habeas corpus relief); *Carbo v. United States*, 364 U.S. 611, 621 (1961) (a federal court's habeas decision "'may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court' after the suit is begun") (quoting *Ex parte Endo*, 323 U.S. 283, 307 (1944)); *see also Miller v. Overholser*, 206 F.2d 415, 419-20 (D.C. Cir. 1953) ("We think it has been settled since the decision of the Supreme Court in *In re Bonner* that the writ is available to test the validity not only of the fact of confinement but also of the place of confinement.").[11]

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[11] *See also* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 36.3 (5th ed. 2005) ("[T]he federal courts have inherent authority to preserve or modify a prisoner's custody status during all phases of a habeas corpus proceeding. That authority extends, at the least, to issuance by the district

These decisions are grounded in the origins of federal habeas power. The Habeas Corpus Act of 1679, which codified the English common law writ, specifically prevented "[t]he possibility of evading judicial review through [] spiriting-away" of the King's prisoners. *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting). Justice Scalia dissented in *Boumediene* on the issue of whether the writ reached Guantánamo, but agreed that the writ as embodied by the 1679 Act embraced a claim, like the one here, against transfer outside of the jurisdiction. *Id.* Indeed, the full name of this foundational statute under Charles II was "An Act for the better securing the Liberty of the Subject and *for the Prevention of Imprisonment beyond the Seas*." (emphasis added). Thus, Article XII of the Act forbade "the shipment of prisoners to places where the writ did not run or where its execution would be difficult." *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting); *see also* App. 27a ("Since at least the seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond its reach where they would be subject to continued detention on behalf of the government.") (Griffith, J., dissenting).[12]

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court—at any time after it concludes that it has personal and subject matter jurisdiction—of an order forbidding transfer to another facility if (1) transfer would threaten the court's jurisdiction or venue or adversely affect the efficiency, fairness, or remedial capacity of the proceedings, and (2) there is no 'need therefor.'") (citations omitted).

[12] The *Boumediene* majority also recognized that the 1679 Act was "the model upon which the habeas statutes of the 13 American colonies were based." 128 S. Ct. at 2246. Passage of the 1679 act was motivated in large part by the practice of the Earl of Clarendon, who was impeached in 1667 for sending persons "to be imprisoned against the law in remote islands, garrisons, and other

Petitioners' claims here, that the Executive may not unilaterally effect a transfer that might divest the district court's habeas jurisdiction without notice and an opportunity to be heard, are substantially the same claims recognized by the English common law writ in 1679.

The principle that the Executive may not unilaterally transfer a prisoner out of the jurisdiction is not new. Magna Carta provides that "[n]o freeman shall be taken, or imprisoned, or disseised, or outlawed, *or exiled*, or in any way harmed—save by the lawful judgment of his peers or by the law of the land." Magna Carta § 39 (emphasis added). Petitioners' claims for notice and opportunity for judicial review of a proposed transfer from Guantánamo fall squarely within this promise of Magna Carta, which is fulfilled by the Great Writ. *See Boumediene*, 128 S. Ct. at 2244 ("the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled"). The Writ has also long required review of Executive decisions concerning

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places." Br. of Legal Historians as Amicus Curiae in Supp. of Pet'rs, at 10, *Boumediene v. Bush*, Nos. 06-1195 and 06-1196 (U.S. Aug. 2007); *see also* Br. of the Commonwealth Lawyers Ass'n as Amicus Curiae in Supp. of Petr's, at 6, *Boumediene v. Bush*, Nos. 06-1195 and 06-1196 (U.S. Aug. 24, 2007) (The Habeas Corpus Act was designed to counter executive practices of moving prisoners "from gaol to gaol so that it was impossible to serve the proper gaoler with the writ . . . [as well as the problem of] prisoners [] removed overseas so giving rise to practical difficulties in terms of communication (between the detained person and those acting on his behalf), service (on the relevant gaoler), and enforcement of the writ (by production of the detained person) if the writ was issued.").

transfer that could result in a detainee's torture or other inhumane treatment.[13]

The Notice Orders simply provide Petitioners with notice and an opportunity to raise these well-established common law habeas claims—which predate even our Constitution—if Petitioners chose to do so upon notice of a proposed transfer.[14] Under the D.C. Circuit's holding here, there will be *no* notice or judicial review of the ongoing process of transferring detainees out of Guantánamo in these cases or any other action where the Executive might attempt to defeat jurisdiction by sending a habeas petitioner to a location potentially beyond the reach of the court. This extraordinary delegation of power to the Executive

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[13] In *Sommersett's Case*, 20 How. St. Tr. 1, 80-82 (1772) (discussed in *Boumediene*, 128 S. Ct. at 2248), slavery abolitionists obtained a writ of habeas corpus with respect to the holding of James Sommersett, an African born slave "by the laws of Virginia," who was soon to be transferred to Jamaica to continue a life of slavery. Lord Mansfield granted the writ, and on hearing arguments on the return, ordered Sommersett be released immediately. *See also Robert Murray's Case* (1679) (petitioner bailed from custody expressly to bar transfer to Scotland, which continued to use torture until 1707 and where he appeared to be more likely than not to face torture); *see generally* John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* (1977).

[14] Indeed, over one hundred years before the adoption of the Constitution, the jailer's obligation to keep the prisoner within the jurisdiction pending judicial review was so well-recognized as part of a meaningful remedy in habeas corpus that a breach of that obligation rendered the jailer liable to criminal penalties. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 896 n.23 (2d Cir. 1996).

branch by the lower court calls out for this Court's review.

B. The Court Should Review Whether The D.C. Circuit's Decision Violates Petitioners' Due Process Rights

In giving the Executive unreviewable discretion to effect a transfer of these Petitioners out of Guantánamo, the D.C. Circuit held that Petitioners were not entitled to the due process requisites of notice and an opportunity to be heard when one's life and liberty are at stake. The correctness of this decision is an issue of obvious importance that affects the hundreds of Guantánamo detainees that have Notice Orders in place and whom the Executive now wishes to expeditiously transfer.

While the federal courts' common law habeas powers discussed above provide a sufficient basis for notice and judicial review of transfers that might result in torture or continued unlawful detention, Petitioners also possess due process protections against transfer to torture or continued unlawful detention that can be raised under Section 2241(c)(3) and thus require the Notice Orders. *See* 28 U.S.C. § 2241(c)(3) (providing the writ of habeas corpus when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States"). The Due Process Clause provides that "certain substantive rights—life, liberty and property—cannot be deprived except pursuant to constitutionally adequate procedures. . . . The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett*

v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring)).

The D.C. Circuit "assume[d] arguendo these alien detainees have . . . constitutional rights with respect to their proposed transfer." App. 9a n.*.[15] However, the Court of Appeals held that Petitioners could be sent by the Executive to a location, such as China, where they might be tortured, subjected to further unlawful detention or other acts that impair their life and liberty interests—with *no* notice of the proposed governmental action or any opportunity to challenge it. This holding is in obvious conflict with the "essential principle of due process . . . that a deprivation of life, liberty, or property *'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'*" *Cleveland Bd. of Educ.*, 470 U.S. at 542 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (emphasis added).

The Notice Orders were narrowly tailored to provide Petitioners with these basic procedures of notice and an opportunity to be heard. There was no

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[15] *Rasul* held that statutory habeas extends to Guantánamo detainees. 542 U.S. at 481. *Boumediene* provides that Petitioners' statutory habeas rights survived the Military Commissions Act of 2006, which the Court found to constitute an unconstitutional suspension of the writ. 128 S. Ct. at 2266 (stating that section 2241 "would govern in MCA § 7's absence"). It necessarily follows from the Court's holding and analysis in *Rasul* and *Boumediene* that the Due Process Clause reaches Guantánamo. However, in *Kiyemba I*, the D.C. Circuit held that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." 555 F.3d at 1026-27 & n.9. That decision is now before this Court in the certiorari petition granted on October 20, 2009.

injunction against any specific transfer and, in fact, the record amply demonstrates that these and other Petitioners would approve any reasonable relocation proposal, just as they have done in the past. However, without the Notice Orders, nothing would prevent the Executive from making a transfer literally in the middle of a habeas hearing, potentially divesting the district court's jurisdiction to adjudicate Petitioners' claims and leaving them subject to bodily harm and/or further unlawful detention.

Petitioners have due process life and liberty interests at stake because they seek an opportunity to assert a claim that they will be unlawfully detained or tortured upon transfer out of Guantánamo. *See Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) ("While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.") (footnote omitted). Torture and unlawful detention are self-evidently "bodily restraint and punishment." But the D.C. Circuit's unprecedented decision held that Petitioners here have *no* procedural rights to notice or an opportunity to challenge a proposed transfer, including to present a claim against moving Petitioners to a location arguably beyond the reach of the Great Writ where they will suffer continued unlawful detention or torture.

Petitioners' due process rights are not adequately protected by the Executive's four-year old policy declaration that it did not presently intend (as of 2005) to transfer detainees to locations where they are more likely than not to be tortured. Without notice, there

will be no opportunity for Petitioners or the court to determine whether the Executive's stated policy has changed or, even if it has not, whether the proposed transfer is in fact consistent with that stated policy. Moreover, the Executive has provided no assurance—generic or otherwise—that Petitioners will not be transferred for further unlawful detention, which would impair the Petitioners' life and liberty interests and independently necessitate notice and an opportunity to be heard. App. 33a ("The declaration expressly left open the possibility that a foreign nation will continue detention of the petitioners.") (Griffith, J., dissenting).

Rochin recognized that individuals have a substantive due process right against government conduct that "shocks the conscience," and torture or indefinite unlawful imprisonment of non-enemy combatants at the behest of the Government shocks the conscience. *See Rochin v. California*, 342 U.S. 165, 172 (1952); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (Torture is inconsistent with "'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.'") (citation omitted); *see also Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating that evidence obtained through conduct that "shock[s] the conscience" may not be used to support a criminal conviction). In addition, this Court held that "'arbitrary action of government'" shocks the conscience where "the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citations omitted). Transfer for further unlawful detention of these Petitioners—who the

Government has conceded are not enemy combatants--would qualify as such an arbitrary act "without any reasonable justification in the service of a legitimate governmental objective." The lack of any procedural protections for Petitioners further underscores that "the fault lies in a denial of fundamental procedural fairness." Petitioners are at least entitled under procedural due process to notice and an opportunity to be heard on a claim that their substantive due process rights would be violated by the Executive's proposed transfer out of Guantánamo.

In sum, the Court should grant certiorari to review whether Petitioners' due process rights to notice and to be heard when their life and liberty interests are at stake has been impermissibly eliminated by the D.C. Circuit's holding that they have no right to notice or opportunity to challenge a transfer out of Guantánamo that might result in further unlawful detention or torture. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (O'Connor, J.) ("'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' . . . These essential constitutional promises may not be eroded.") (citations omitted).

C. This Court's Decision In *Munaf* Left Open Important Habeas And Due Process Issues That Should Be Decided Here

The D.C. Circuit's decision below held that Petitioners' common law habeas and due process rights set forth above were overridden by this Court's decision in *Munaf*, 128 S. Ct. 2207. However, as the concurring and dissenting opinion pointed out: "the *Munaf* petitioners knew in advance that the

government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful"—thus "[t]here was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to prevent an unlawful transfer." App. 33a-34a. Unlike the injunction in *Munaf*, the Notice Orders here merely provided notice, and did not enjoin any specific transfer contemplated by the Executive. Moreover, *Munaf* does not preclude Petitioners' claims against a transfer as a matter of law and indeed specifically left open important questions directly implicated here.

First, the *Munaf* majority left open whether a petitioner could block a transfer in an "extreme case" where it was more likely than not that he would be tortured. 128 S. Ct. at 2226; *see also id.* at 2228 (Souter, J., joined by Ginsburg, Breyer, JJ., concurring) (noting same caveat would extend "to a case in which the probability of torture is well documented, *even if the Executive fails to acknowledge it*") (emphasis added).[16]

Second, as the three-member concurrence in *Munaf* emphasized, the decision left open whether a petitioner could be entitled to an injunction against transfer in circumstances *other than* those present in *Munaf*: "(1) [petitioners] 'voluntarily traveled to Iraq.'

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[16] While the D.C. Circuit noted that *Munaf* recognizes the possibility that a court could bar transfers proposed by the Executive in "extreme cases," App. 10a n.*, *Kiyemba II* nevertheless prevented the district court from testing Executive proclamations to determine whether it has in fact been presented with such a case.

They are being held (2) in the 'territory' of (3) an 'all[y]' of the United States, (4) by our troops, (5) 'during ongoing hostilities' that (6) 'involv[e] our troops.' (7) The government of a foreign sovereign, Iraq, has decided to prosecute them 'for crimes committed on its soil.' And (8) 'the State Department has determined that . . . the department that would have authority over [petitioners] . . . as well as its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs.'" *Id.* at 2228 (Souter, J., concurring) (second and third alterations in original) (citations omitted).[17] Of the eight circumstances "essential to the Court's holding" that an Executive transfer would not be blocked in *Munaf*, only one is present here: Petitioners are being held by the U.S. military.

By leaving open these questions for future consideration, *Munaf* made clear that it did not

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[17] In denying the injunction, the *Munaf* majority opinion emphasized that the relief petitioners sought "would interfere with Iraq's sovereign right to 'punish offenses against its laws committed within its borders,'" and would essentially use habeas as "a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." 128 S. Ct. at 2220, 2223 (citation omitted). That, indisputably, is not this case, where Petitioners were involuntarily brought to Guantánamo and there is no claim that they have committed crimes in another country to which they will be transferred for lawful prosecution. *Cf. In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. at 42 (App. 84a-85a) ("[T]he court's authority to safeguard an individual's liberty from unbridled executive fiat reaches its zenith when the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release.").

preclude a district court from requiring the Executive to provide advance notice of a proposed transfer of a habeas petitioner or any review of a claim opposing the transfer that any habeas petitioner might make. Indeed, the Court's recognition in *Munaf* of other circumstances where a proposed transfer of a habeas petitioner could be enjoined necessarily requires notice and an opportunity to be heard so that the district court can determine whether such circumstances are present. Critically, the *Munaf* petitioners themselves were notified of the transfer and were able to challenge the Government's evidence with respect to the specific proposed transfer to Iraq. In *Munaf*, the Executive submitted a declaration regarding the specific country of transfer and even the specific ministry that would have authority over their detention, which petitioners had an opportunity to challenge. 128 S. Ct. at 2226. The D.C. Circuit's decision in this case, however, precludes a district court from ever requiring advance notice of a proposed transfer, thus denying other detainees, including Petitioners here, an entitlement to the same opportunity to be heard that was afforded to the petitioners in *Munaf* "to call the jailer to account." *Boumediene*, 128 S. Ct. at 2247.[18]

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[18] The declarations on which the D.C. Circuit relied are critically different from the government assurances provided in *Munaf*. Generic statements (made by two officials of the former administration who have long since left their posts) asserting no more than the fact that the government intended to follow its own policies cannot be likened to the country-specific determinations that this Court relied upon in *Munaf*. Indeed, as the dissent below noted, the declarations provided here "expressly left open the possibility that a foreign nation will continue detention of the petitioners." App. 33a (Griffith, J., dissenting) (citing Decl. of Matthew C. Waxman, Deputy Assistant Sec'y of Def. for Detainee Affairs, at 2 (June 2, 2005) (describing Executive's policy of

Petitioners submit that they are entitled to notice and an opportunity to obtain judicial review of claims relating to their proposed transfer, if necessary, once the circumstances of the proposed transfer are known. This Court's review is required to correct the D.C. Circuit's erroneous application of *Munaf* as categorically precluding that basic process and to address the open questions that *Munaf* identified, which are directly at stake here.

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transfer "to the control of other governments for continued detention")). Under common law practice, the habeas court's power was not limited to accepting generic or otherwise insufficient declarations by the Executive, either in the form of a return or a supporting affidavit. *See, e.g.*, *Strudwick's Case*, 94 Eng. Rep. 271 (K.B. 1744) (responding to a return that a prisoner was too sick to be produced in court by ordering and considering affidavits from both sides on the question of the prisoner's health); *Emerton's Case*, 84 Eng. Rep. 829 (K.B. 1675) (finding return insufficient on basis of three affidavits attesting that petitioner's wife was still under respondent's custody, despite respondent's denial); *United States v. Irvine*, National Archives Microfilm, M-1184, roll 1 (C.C. D. Ga. May 18, 1815) (discharging petitioner because detaining officer's affidavit failed to provide specific proof supporting general statements that enlistment had been obtained with parental consent); *Leonard Watson's Case*, 112 Eng. Rep. 1389, 1415 (K.B. 1839) (requiring jailer to explain the alleged untruths in the original return after petitioner was allowed to challenge return's veracity); *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 682, 685 (E.D. Pa. 1855) (finding after hearing that return of writ was "evasive, if not false").

II. The D.C. Circuit's Holding That An All Writs Act Injunction Must Meet The Traditional Preliminary Injunction Factors Presents A Circuit Split

In granting the Notice Orders, the district court relied upon the All Writs Act. *See* App. 54a (citing 28 U.S.C. § 1651(a) ("all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law").[19] The two predicates for issuing an order under the All Writs Act are (1) "'jurisdiction already existing,'" *Adams v. McCann*, 317 U.S. 269, 273 (1942) (citation omitted), and (2) that "the integrity of [that jurisdiction] is being threatened by some action or behavior." *Klay*, 376 F.3d at 1100. Because both conditions are indisputably present here—(1) the district court has jurisdiction to review a proposed transfer under the habeas authority recognized in *Boumediene*, *see* App. 5a-6a, and (2) the Government's stated intent to unilaterally transfer petitioners out of Guantánamo threatens that jurisdiction—the district court properly entered the Notice Orders pursuant to the All Writs Act statute.

The D.C. Circuit's majority opinion, however, broke with these standards and held that an All Writs Act injunction may only issue "'if a party satisfies the [four] criteria for issuing a preliminary injunction'"

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[19] The All Writs Act was originally codified in the Judiciary Act of 1789, which Justice O'Connor described as "the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself." Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. Cin. L. Rev. 1, 3 (1990).

under Federal Rule of Civil Procedure 65. App. 8a n.* (alteration in original) (citation omitted). In so holding, the D.C. Circuit directly split with the Eleventh Circuit's decision in *Klay*, which squarely held that "[t]he requirements for a traditional [Rule 65] injunction *do not apply* to injunctions under the All Writs Act because the historical scope of a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." 376 F.3d at 1100 (emphasis added) (citing, *inter alia*, *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977) (affirming grant of injunction under the All Writs Act without regard to traditional four factors)). The D.C. Circuit's decision also conflicts with the Second Circuit's holding in *In re Johns-Manville Corp.*, 27 F.3d 48, 49 (2d Cir. 1994) ("We also reject the appellants' procedural objection that the Trial Courts have failed to make the findings required by Rule 65 of the Federal Rules of Civil Procedure. . . . '[I]njunctions issued under the authority of the All-Writs Act stem from very different concerns than those motivating preliminary injunctions governed by Fed. R. Civ. P. 65.'") (citation omitted). This dispute among the Courts of Appeals goes to the heart of federal judicial power, and the Supreme Court should grant certiorari to resolve the recurring issue. *See, e.g.*, Eugene Gressman *et al.*, *Supreme Court Practice* 242 (9th ed. 2007) ("One of the primary purposes of certiorari jurisdiction is to bring about uniformity of decisions on these matters [of federal and general law] among the federal courts of appeals.") (collecting cases).[20]

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[20] Moreover, *Kiyemba II* is in conflict with the D.C. Circuit's own prior precedents. *See Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (issuing All Writs Act injunction

The D.C. Circuit's holding that a district court may act to protect its jurisdiction under the All Writs Act only "'if a party satisfies the [four] criteria for issuing a preliminary injunction,'" App. 8a n.*, effectively limits injunctive relief under the All Writs Act to those circumstances where a party would already be entitled to the same relief under Rule 65. However, as the Eleventh and Second Circuits have recognized, All Writs Act injunctions were intended by Congress to preserve a court's jurisdiction in order to provide a party with *the opportunity* to litigate the merits. *See Klay*, 376 F.3d at 1100 ("Whereas traditional injunctions are predicated upon some cause of action, an All Writs Act injunction is predicated upon some other matter upon which a district court has jurisdiction. Thus, while a party must 'state a claim' to obtain a 'traditional' injunction, there is no such requirement to obtain an All Writs Act injunction—it must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by some action or behavior."); *contra* App. 8a n.*.[21] All Writs Act injunctions are thus critically

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without reference to the Rule 65 factors); *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008) (Guantánamo detainee entitled to All Writs Act injunction even though "the probability of [petitioner's] prevailing on the merits of his habeas petition is far from clear."). Where, as here, an intra-circuit conflict relates to a recurring and important issue it favors the grant of certiorari. *See Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709 n.5 (2003) (certiorari granted to address question on which the Ninth Circuit "expressed divergent views"); *Comm'r v. Estate of Bosch*, 387 U.S. 456, 457 (1967).

[21] *See also* Dimitri D. Portnoi, *Note: Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. Rev. 293, 306 (2008) ("a

different from preliminary injunctions issued under Rule 65, which preserve the status quo once a party has established that he or she is likely to succeed on the merits. The D.C. Circuit thus committed fundamental error when it diverged from the law of other circuits and conflated Rule 65 injunctions with All Writs Act injunctions, and this Court should grant certiorari in order to harmonize the law.[22]

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traditional injunction under Rule 65 requires consideration of four factors: (1) substantial likelihood of success on the merits; (2) irreparable injury; (3) injury to the opposing party; and (4) furthering the public interest. *In contrast, an AWA injunction may be granted whenever it is 'calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it.'"*) (alteration in original) (emphasis added) (citations omitted); *cf. Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1002-03 (5th Cir. 1969) (district court that dismissed action for lack of jurisdiction erred in denying "motion for injunction pending appeal").

[22] Not surprisingly, *Munaf* does not even mention the All Writs Act, let alone discuss its application, because there the Court concluded that the factual record surrounding transfer was fully developed. *See Munaf*, 128 S. Ct. at 2219-20 (deciding merits resolution was ripe); *cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record . . . are not to be considered as having been so decided as to constitute precedents."). Because the petitioners' claims there were ripe for review on substantive grounds, the Court could and did proceed directly to the merits determination under Rule 65, and there was no need to preserve jurisdiction pending the outcome. *See Munaf*, 128 S. Ct. at 2220. Here, however, no specific transfer has been identified yet, and it is thus impossible at this stage to determine Petitioners' likelihood of success on the merits of their claims—*if* they were in fact to object to any such transfer. This case thus squarely presents the important All Writs Act issue, which the Court did not have occasion to address in *Munaf*, whether the district court may preserve its jurisdiction under the statute to consider the claims until the relevant facts are before it.

The Court should grant certiorari to address the clear circuit split on the standard for injunctions under the All Writs Act, which affects all instances in which a federal court may seek to protect its jurisdiction under the statute.

III. In The Alternative, The Court May Hold The Petition Until The Disposition Of *Kiyemba I*

Petitioners respectfully submit that the Court should grant certiorari here without delay. Although all Petitioners here are also petitioners in *Kiyemba I*, the two petitions involve fundamentally different forms of relief. *Kiyemba I* concerns whether a federal court has the habeas power to direct that petitioners who are not enemy combatants be brought to the courtroom so that it might fashion conditions of release. The instant petition concerns the separate, but equally important, question whether a federal court has the authority to require the Executive to provide notice of a proposed transfer so that the court has an opportunity to adjudicate any claims relating to that transfer. For the reasons explained, the questions here are undoubtedly recurring and worthy of immediate review.

However, if the Court believes that it would benefit from a decision in *Kiyemba I* prior to considering the instant petition, it may defer consideration of the merits of this petition until disposition of *Kiyemba I*. *See Keney v. New York*, 388 U.S. 440 (1967).[23] Should

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[23] *Kiyemba I* broadly relates to judicial authority under habeas jurisdiction and the Due Process Clause. Accordingly, it is

the Court do so, and should petitioners prevail in *Kiyemba I*, *Kiyemba II* could be mooted, in which case the petitioners respectfully submit that the Court should grant this petition and remand to the D.C. Circuit to vacate its judgment and dismiss the appeal as moot in order to "'clea[r] the path for future relitigation of the issues between the parties and [to] eliminat[e] a judgment, review of which was prevented through happenstance.'" *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007) (per curiam) (granting, vacating and remanding with instructions to dismiss as moot when case mooted after petition for certiorari filed but before decision on petition) (quoting *Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam), and quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950))) (alterations in original).[24]

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari or, alternatively, defer consideration of the merits of this petition until the disposition of *Kiyemba I*.

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possible that this Court's resolution of *Kiyemba I* may have some bearing on the instant petition. While *Kiyemba I* is pending before the Court, Respondents may not transfer the Petitioners—each of whom is a party to both *Kiyemba I* and *II*—without notice and approval by the Court or Petitioners. *See* Sup. Ct. R. 36 ("Pending review in this Court of a decision in a habeas corpus proceeding . . . the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.").

[24] *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-73 (1997) (vacatur appropriate where employee resignation rendered case moot prior to intervener's petition for certiorari).

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5487
Consolidated with 05-5489

[Filed April 7, 2009]

JAMAL KIYEMBA, NEXT FRIEND, ET AL.,	)
APPELLEES	)
	)
V.	)
	)
BARACK OBAMA, PRESIDENT OF THE	)
UNITED STATES, ET AL.,	)
APPELLANTS	)
	)

Appeals from the United States District Court
for the District of Columbia
(No. 05cv01509)
(No. 05cv01602)

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Gregory G. Katsas*, Assistant Attorney General, *Jonathan F. Cohn*, Deputy Assistant Attorney General, and *Douglas N. Letter*, *Jonathan H. Levy*, *Catherine Y. Hancock*, and *Sameer Yerawadekar*, Attorneys.

Christopher P. Moore argued the cause for appellees. With him on the briefs were *Jonathan I. Blackman, Rahul Mukhi, Aaron Marr Page, Susan Baker Manning, P. Sabin Willett, Rheba Rutkowski, Neil McGaraghan, Jason S. Pinney,* and *Gitanjali Gutierrez.*

Before: GINSBURG, GRIFFITH, and KAVANAUGH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Concurring opinion filed by *Circuit Judge* KAVANAUGH.

Opinion concurring in the judgment in part and dissenting in part filed by *Circuit Judge* GRIFFITH.

GINSBURG, *Circuit Judge*: Nine Uighurs held at Guantanamo Bay, in order to challenge their detention, petitioned the district court for a writ of habeas corpus. Asserting that they feared being transferred to a country where they might be tortured or further detained, they also sought interim relief requiring the Government to provide 30 days' notice to the district court and to counsel before transferring them from Guantanamo. The district court entered the requested orders. *Kiyemba v. Bush*, No. 1:05cv1509 (Sept. 13, 2005); *Mamet v. Bush*, No. 1:05cv1602 (Sept. 30, 2005). The Government appealed each of the orders and we consolidated its appeals. In light of the Supreme Court's recent decision in *Munaf v. Geren*, 128 S. Ct. 2207 (2008), we now reverse.

I. Background

In granting the request for 30 days' notice of any planned transfer, the district court in *Mamet* noted the detainee's fear of being tortured. In *Kiyemba* the district court did not advert to the detainees' fear of harm but entered an order requiring pre-transfer notice lest removal from Guantanamo divest the court of jurisdiction over the detainees' habeas petitions.

While this appeal was pending, the Congress passed the Military Commissions Act (MCA), § 7 of which provided:

> No court ... shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Pub. L. No. 109-366, 120 Stat. 2600, 2635-36 (2006) (codified at 28 U.S.C. § 2241(e)(1)). Accordingly, we dismissed the cases for lack of subject matter jurisdiction. *Kiyemba v. Bush*, No. 05-5487 (Mar. 22, 2007). In *Boumediene v. Bush*, however, the Supreme Court held § 2241(e)(1) "effects an unconstitutional suspension of the writ" of habeas corpus. 128 S. Ct. 2229, 2274 (2008). In light of that decision, we vacated our judgment of dismissal and reinstated the

Government's appeal. *Kiyemba*, No. 05-5487 (July 31, 2008).*

II. Subject Matter Jurisdiction

We begin with the Government's argument that the MCA bars the district court from exercising jurisdiction in their ongoing habeas cases over claims related to the detainees' potential transfer. The Government contends the Supreme Court in *Boumediene* held the first provision of § 7 of the MCA, 28 U.S.C. § 2241(e)(1), unconstitutional only insofar as it purported to deprive the district court of jurisdiction to hear a claim falling within the "core" of the constitutional right to habeas corpus, such as a challenge to the petitioner's detention or the duration thereof. According to the Government's theory, because the right to challenge a transfer is "ancillary" to and not at the "core" of habeas corpus relief, § 2241(e)(1) still bars the district court from exercising jurisdiction over the instant claims. In support of its argument, the Government invokes the rule that ordinarily a court should invalidate as little of an unconstitutional statute as necessary to bring it into conformity with the Constitution. *See Ayotte v. Planned Parenthood of*

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* After oral argument in the court of appeals, the Government acknowledged in the district court that it no longer views any of the present petitioners as enemy combatants, whereupon the district court ordered them released into the United States. *See In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008). The Government appealed that order, which this court reversed on the ground that the political branches have "the exclusive power ... to decide which aliens may, and which aliens may not, enter the United States, and on what terms." *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (2009).

N. New Eng., 546 U.S. 320, 329 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary .... Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course." (internal quotation marks omitted)).

In response, the detainees maintain it was no accident that the Court in *Boumediene* avoided making just the sort of fine distinction the Government proposes. They point specifically to the Court's caution in *Ayotte* that "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than we ought to undertake." *Id.* at 330 (internal quotation marks omitted).

We think the detainees have the better of the argument. The Court in *Boumediene* did not draw (or even suggest the existence of) a line between "core" and "ancillary" habeas issues, neither of which terms appears in the opinion (apart from the innocuous observation that "Habeas is, at its core, an equitable remedy"). Rather, the Court stated simply that § 2241(e)(1) "effects an unconstitutional suspension of the writ." 128 S. Ct. at 2274.* Accordingly, we read *Boumediene* to invalidate § 2241(e)(1) with respect to all habeas claims brought by Guantanamo detainees,

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* The Court actually referred to § 7 without specifying a particular subsection of § 2241(e) but its discussion of the Suspension Clause clearly indicates it was referring only to that part of § 7 codified at § 2241(e)(1).

not simply with respect to so-called "core" habeas claims.[**]

The Government next argues the second provision of MCA § 7 stripped the district court of jurisdiction. That provision eliminates court jurisdiction over "any other action against the United States or its agents relating to any aspect of the ... transfer" of a detainee. 28 U.S.C. § 2241(e)(2). This case does not come within the reach of § 2241(e)(2), however. That provision applies by its terms to "any other action" – meaning other than a petition for a writ of habeas corpus, which is the subject of § 2241(e)(1). The detainees' claims are not in the nature of an action barred by § 2241(e)(2) because, based upon longstanding precedents, it is clear they allege a proper claim for habeas relief, specifically an order barring their transfer to or from a place of incarceration. *See Benson v. McMahon*, 127 U.S. 457, 462 (1888) (reviewing, on petition for writ of habeas corpus, claim of unlawful extradition); *Ward v. Rutherford*, 921 F.2d 286, 288 (D.C. Cir. 1990) ("[A]ctions taken by magistrates in international extradition matters are subject to habeas corpus review by an Article III district judge"); *INS v. St. Cyr*, 533 U.S. 289, 305-08 (2001) (detailing long history of

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[**] Thus, the Court necessarily restored the status quo ante, in which detainees at Guantanamo had the right to petition for habeas under § 2241. *See Rasul v. Bush*, 542 U.S. 466 (2004); *see also Boumediene*, 128 S. Ct. at 2266 (identifying § 2241 as "the habeas statute that would govern in MCA § 7's absence"). There is, therefore, no need to decide today whether the present petitions come within "the contours and content of constitutional habeas," Dis. Op. at 2. *See INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001) (noting that "what the Suspension Clause protects" is a "difficult question").

reviewing deportations per petition for habeas); *In re Bonner*, 151 U.S. 242, 255-56 (1894); *Miller v. Overholser*, 206 F.2d 415, 419-20 (D.C. Cir. 1953) ("We think it has been settled since ... *Bonner* that the writ is available to test the validity not only of the fact of confinement but also of the place of confinement").

Because a potential transfer out of the jurisdiction of the court is a proper subject of statutory habeas relief, § 2241(e)(2) does not apply to and therefore does not deprive the court of jurisdiction over the claims now before us. Even "where a habeas court has the power to issue the writ," however, the question remains "'whether this be a case in which [that power] ought to be exercised.'" *Munaf*, 128 S. Ct. at 2221 (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830)). We turn, accordingly, to the merits of the petitioners' claims.

III. Proper Grounds for Habeas Relief

A court considering a request for preliminary relief must examine four factors: (1) the moving party's likelihood of success on the merits; (2) irreparable injury to the moving party if an injunction is denied; (3) substantial injury to the opposing party if an injunction is granted; and (4) the public interest. *Belbacha v. Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008). We review for abuse of discretion the district court's weighing of these factors; insofar as "the district court's decision hinges on questions of law," however, our review is *de novo*. *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (internal quotation marks omitted). If the moving party can show no likelihood of success on the merits, then preliminary relief is obviously improper and the

appellant is entitled to reversal of the order as a matter of law. *See Munaf*, 128 S. Ct. at 2220.*

The detainees here seek to prevent their transfer to any country where they are likely to be subjected to further detention or to torture. Our analysis of their claims is controlled by the Supreme Court's recent decision in *Munaf*. In that case, two American citizens held in the custody of the United States military in Iraq petitioned for writs of habeas corpus, seeking to enjoin the Government from transferring them to Iraqi custody for criminal prosecution in the Iraqi courts. *Id.* at 2214-15. The Court held the district court had jurisdiction over the petitions, but that it could not enjoin the Government from transferring the petitioners to Iraqi authorities. *Id.* at 2213. As we explain below, *Munaf* precludes a court from issuing a writ of habeas corpus to prevent a transfer on the

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* The detainees argue the district court in *Kiyemba* correctly issued the injunction – regardless of their ability to make a showing on the four factors for granting preliminary relief – in order to protect the court's jurisdiction over their underlying claims of unlawful detention. In defense of the district court's rationale, the detainees rely upon the All Writs Act, 28 U.S.C. § 1651 (federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions"), and upon our opinion in *Belbacha*, but they overstate the holding in that case. In *Belbacha*, we held that "when the Supreme Court grants certiorari to review this court's determination that the district court lacks jurisdiction, a court can, pursuant to the All Writs Act ... and during the pendency of the Supreme Court's review, act to preserve the status quo," but only, we added, "if a party satisfies the [four] criteria for issuing a preliminary injunction." 520 F.3d at 457. *Belbacha* therefore provides no basis for relieving the detainees of the need to satisfy the standard for a preliminary injunction, which, as discussed below, they have failed to do.

grounds asserted by the petitioners here; therefore the detainees cannot prevail on the merits of their present claim and the Government is entitled to reversal of the orders as a matter of law.*

A. Fear of Torture

Like the detainees here, the petitioners in *Munaf* asked the district court to enjoin their transfer because they feared they would be tortured in the recipient country. The Court recognized the petitioners' fear of torture was "of course a matter of serious concern," but held "in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. The context to which the Court referred was one in which – as here – the record documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured. *Id.* at 2226. Indeed, as the present record shows, the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee. Decl. of Pierre-Richard Prosper, United States Ambassador-at-Large for War Crimes Issues ¶¶ 4, 7-8, Mar. 8, 2005.

The upshot is that the detainees are not liable to be cast abroad willy-nilly without regard to their likely treatment in any country that will take them. Under *Munaf*, however, the district court may not question the Government's determination that a potential

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* For present purposes, we assume arguendo these alien detainees have the same constitutional rights with respect to their proposed transfer as did the U.S. citizens facing transfer in *Munaf*. They are not, in any event, entitled to greater rights.

recipient country is not likely to torture a detainee. 128 S. Ct. at 2226 ("The Judiciary is not suited to second-guess such determinations — determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area"). In light of the Government's policy, a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country.*

The detainees seek to distinguish *Munaf* on the ground that the habeas petitioners in that case did not raise a claim under the Convention Against Torture, as implemented by the Foreign Affairs Reform and Restructuring (FARR) Act, 8 U.S.C. § 1231 note. *See Munaf*, 128 S. Ct. at 2226 n.6. That distinction is of no help to them, however, because the Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal. 8 U.S.C. § 1252(a)(4) ("Notwithstanding any other provision of law ... including section 2241 of Title 28, or any other habeas corpus provision, ... a petition for review [of an order of removal] shall be the sole and exclusive means for judicial review of any cause or claim" arising under the Convention). Here the detainees are not challenging a final order of removal. As a consequence,

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* As in *Munaf*, we need not address what rights a detainee might possess in the "more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 128 S. Ct. at 2226.

they cannot succeed on their claims under the FARR Act, and *Munaf* controls.*

B. Prosecution or Continued Detention

To the extent the detainees seek to enjoin their transfer based upon the expectation that a recipient country will detain or prosecute them, *Munaf* again bars relief. After their release from the custody of the United States, any prosecution or detention the petitioners might face would be effected "by the foreign government pursuant to its own laws and not on behalf of the United States." Decl. of Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs ¶ 5, June 2, 2005. It is a longstanding principle of our jurisprudence that "[t]he jurisdiction of [a] nation, within its own territory, is necessarily exclusive and absolute." *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). As the Supreme Court explained in *Munaf*, the "same principles of comity and respect for foreign sovereigns that preclude judicial scrutiny of foreign convictions necessarily render invalid attempts to shield citizens from foreign prosecution." 128 S. Ct. at 2224 (quoting Brown, J., dissenting in part in *Omar v. Harvey*, 479 F.3d 1, 17 (D.C. Cir. 2007)). *Munaf* therefore bars a court from

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Munaf concerned a specific transfer, but the transferee sovereign's likely treatment of the petitioners was not material to its holding. Contrary to the statement in the dissent, the Court gave not merely "substantial weight to the [G]overnment's determination that the proposed transfer was lawful," Dis. Op. at 7; it held the judiciary cannot look behind the determination made by the political branches that the transfer would not result in mistreatment of the detainee at the hands of the foreign government. 128 S. Ct. at 2225, 2226.

issuing a writ of habeas corpus to shield a detainee from prosecution and detention by another sovereign according to its laws.

Judicial inquiry into a recipient country's basis or procedures for prosecuting or detaining a transferee from Guantanamo would implicate not only norms of international comity but also the same separation of powers principles that preclude the courts from second-guessing the Executive's assessment of the likelihood a detainee will be tortured by a foreign sovereign. *See id.* at 2225 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"). Furthermore, the requirement that the Government provide pre-transfer notice interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees. Prosper Decl. ¶ 10 ("Later review in a public forum of the Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture ... and to reach acceptable accommodations with other governments to address those important concerns").*

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* Our dissenting colleague agrees the detainees cannot prevail on a claim based upon their likely treatment by a foreign sovereign acting pursuant to its own laws. *See* Dis. Op. at 5 ("[T]he [G]overnment has submitted sworn declarations assuring the court that any transfer will result in release from U.S. authority. If the [G]overnment's representations are accurate, each transfer will be lawful."). Nor can they prevail on the ground that the

In short, "habeas is not a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them." *Munaf*, 128 S. Ct. at 2223. Therefore, the district court may not issue a writ of habeas corpus to shield a detainee from prosecution or

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foreign sovereign is an agent of the United States merely because, with respect to detainees who are — unlike the present petitioners — regarded as enemy combatants, the Government engages in a dialogue "to ascertain or establish what measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will ensure that the detainee will not pose a continuing threat to the United States and its allies," Waxman Decl. ¶ 5. The dissent takes note of the Government's statement that "under appropriate circumstances," it transfers detainees "to the control of other governments for continued detention," *see* Dis. Op. at 6, but, as the Government explains, "[i]n all such cases ... the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States," Waxman Decl. ¶ 5. Whether, acting pursuant to its own laws, a "foreign nation will continue detention of the petitioners," Dis. Op. at 6, is precisely the inquiry *Munaf* forbids this court from undertaking.

This case involves the Government's proposed release from U.S. custody of detainees whom the Government no longer regards as enemy combatants. It does not involve — and therefore, unlike our dissenting colleague, we express no opinion concerning — the transfer of detainees resulting in their "continued detention on behalf of the United States in places where the writ does not extend," Dis. Op. at 4. The Government represents that it is trying to find a country that will accept the petitioners and, in the absence of contrary evidence, we presume public officers "have properly discharged their official duties." *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926). In view of the Government's sworn declarations, and of the detainees' failure to present anything that contradicts them, we have no reason to think the transfer process may be a ruse — and a fraud on the court — designed to maintain control over the detainees beyond the reach of the writ.

detention at the hands of another sovereign on its soil and under its authority. As a result, the petitioners cannot make the required showing of a likelihood of success on the merits necessary to obtain the preliminary relief they here seek.

IV. Conclusion

The Supreme Court's ruling in *Munaf* precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipient country. The Government has declared its policy not to transfer a detainee to a country that likely will torture him, and the district court may not second-guess the Government's assessment of that likelihood. Nor may the district court bar the Government from releasing a detainee to the custody of another sovereign because that sovereign may prosecute or detain the transferee under its own laws. In sum, the detainees' claims do not state grounds for which habeas relief is available. The orders of the district court barring their transfer without notice during the pendency of their habeas cases therefore must be and are

Vacated.

KAVANAUGH, *Circuit Judge*, concurring: I agree with and join the persuasive opinion of the Court. Under current law, the U.S. Government may transfer Guantanamo detainees to the custody of foreign nations without judicial intervention – at least so long as the Executive Branch declares, as it has for the Guantanamo detainees, that the United States will not transfer "an individual in circumstances where torture

is likely to result." *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008).

I write separately to emphasize three points.

First, our disposition does not preclude Congress from further regulating the Executive's transfer of wartime detainees to the custody of other nations. Congress possesses express constitutional authority to make rules concerning wartime detainees. *See, e.g.*, U.S. CONST. art. I, § 8 ("Congress shall have Power . . . To . . . make Rules concerning Captures on Land and Water"). The constitutional text, Justice Jackson's *Youngstown* opinion, and recent Supreme Court precedents indicate that the President does not possess exclusive, preclusive authority over the transfer of detainees. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Except perhaps in a genuine, short-term emergency, the President must comply with legislation regulating or restricting the transfer of detainees. In other words, under the relevant precedents, the President does not have power to trump legislation regarding wartime transfers in a *Youngstown* category-three situation. To be sure, there are weighty policy reasons why Congress may not seek to restrict the Executive's transfer authority or to involve the Judiciary in reviewing war-related transfers. That presumably explains why Congress has not done so. But to the extent Congress wants to place judicially enforceable restrictions on Executive transfers of Guantanamo or other wartime detainees, it has that power.

Second, in the absence of a meritorious statutory claim,[1] the detainees argue that they have a constitutional due process right against "transfer to torture" – and, therefore, to judicial reassessment of the Executive's conclusion that transfer to a foreign nation's custody is unlikely to result in torture. But both *Munaf* and the deeply rooted "rule of non-inquiry" in extradition cases require that we defer to the Executive's considered judgment that transfer is unlikely to result in torture. Those precedents compel us to reject the detainees' argument that the court second-guess the Executive's conclusion in this case.

In *Munaf*, in response to a similar due process claim, the Supreme Court unanimously held that the Judiciary may not "second-guess" the Executive's assessment that transferred detainees are unlikely to be tortured by the receiving nation (in that case, by Iraq, where the detainees were to be prosecuted in Iraqi courts). 128 S. Ct. at 2226.[2] The *Munaf* decision

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[1] The detainees advance a claim under the Foreign Affairs Reform and Restructuring Act, but that argument is unavailing. *See* Maj. Op. at 9-10.

[2] There is no meaningful distinction between (i) the Executive's declaration in this case that no Guantanamo detainees will be transferred to the custody of a foreign country where the Executive believes they would likely be tortured, and (ii) a similar Executive declaration with respect to a specific transfer (as in *Munaf*). The former encompasses the latter. In other words, for our purposes, the Government has represented that no detainee in this case will be transferred to a country where the Government believes it likely the detainee would be tortured. It bears emphasis that neither *Munaf* nor this case is the "more extreme case in which the Executive has determined that a

applies here a fortiori: That case involved transfer of *American citizens*, whereas this case involves transfer of alien detainees with no constitutional or statutory right to enter the United States.

Similarly, the longstanding rule of non-inquiry in extradition cases undermines the detainees' argument. When the Executive seeks extradition pursuant to a request from a foreign nation, the Judiciary does not inquire into the treatment or procedures the extradited citizen or alien will receive in that country. "It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds." *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990); *see also Neely v. Henkel*, 180 U.S. 109, 122-23 (1901); *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006); *United States v. Kin-Hong*, 110 F.3d 103, 110-11 & nn. 11-12 (1st Cir. 1997); *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326-27 (9th Cir. 1997); Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198 (1991).[3]

Therefore, with respect to international transfers of individuals in U.S. custody, *Munaf* and the extradition

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detainee is likely to be tortured but decides to transfer him anyway." 128 S. Ct. at 2226.

[3] The rule of non-inquiry traditionally has not required an express executive declaration regarding the prospect of abuse by the foreign nation. After *Munaf*, courts in extradition cases presumably may require – but must defer to – an express executive declaration that the transfer is not likely to result in torture.

cases have already struck the due process balance between the competing interests of the individual and the Government. That balance controls here.[4] The detainees' interest in avoiding torture or mistreatment by a foreign nation is the same "matter of serious concern" at issue in *Munaf* and the extradition cases.

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[4] In *Boumediene v. Bush*, the Supreme Court held that the Guantanamo detainees possess constitutional habeas corpus rights. 128 S. Ct. 2229, 2262 (2008). This Court has since stated that the detainees possess no constitutional due process rights. *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009). The detainees argue that they must possess due process rights if they have habeas rights. *See Hamdi*, 542 U.S. at 525-26 (plurality opinion) (discussing interaction of habeas and procedural due process); *id.* at 555-58 (Scalia, J., dissenting) (explaining linked origins of habeas and due process). And they further contend that the due process balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), applies here – rather than a test based solely on history and tradition. *See Hamdi*, 542 U.S. at 529 (plurality opinion) (applying *Mathews* test); *see also Boumediene*, 128 S. Ct. at 2283-92 (Roberts, C.J., dissenting) (applying *Mathews* test as articulated in *Hamdi*); *but see Hamdi*, 542 U.S. at 575-77 (Scalia, J., dissenting) (criticizing application of *Mathews* test); *Medina v. California*, 505 U.S. 437, 446-48 (1992) (applying history-based test). That *Mathews / Hamdi* test requires "weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 529 (plurality opinion) (citation and internal quotation marks omitted).

But as explained in the opinion of the Court and in this concurring opinion, the detainees do not prevail in this case even if they are right about the governing legal framework: Even assuming that the Guantanamo detainees, like the U.S. citizens in *Munaf*, possess constitutionally based due process rights with respect to transfers and that the *Mathews / Hamdi* balancing test applies, *Munaf* and other precedents preclude judicial second-guessing of the Executive's considered judgment that a transfer is unlikely to result in torture.

Munaf, 128 S. Ct. at 2225. And on the other side of the ledger, the Government's interest in transferring these detainees to foreign nations without judicial second-guessing is at least as compelling as in those cases. *Cf. id.* at 2224-25 (noting significant governmental interest in detainee transfers connected to "the Executive's ability to conduct military operations abroad").

The detainees counter that the Government's transfer interest in this case involves non-enemy combatants and is therefore less important than in *Munaf* and the extradition cases; they further hint that transfer without their consent would be without legal authority. Those arguments are incorrect for two separate reasons.

To begin with, even if this were just a standard immigration case involving inadmissible aliens at the U.S. border, the governmental interest in transfer would be compelling. Like Guantanamo detainees, inadmissible aliens at the border or a U.S. port of entry have no constitutional right to enter the United States. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210-13 (1953); *see also id.* at 222-23 (Jackson, J., dissenting) (agreeing with majority that there is no constitutional right for an alien to enter the United States); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). In those cases, the United States has a very strong interest in returning the aliens to their home countries or safe third countries so that they will not be detained indefinitely in facilities run by the United States – a scenario that can trigger a host of security, foreign policy, and domestic complications. *Cf.* 8 C.F.R. §§ 241.13, 241.14. That governmental

interest applies at least as strongly in the case of these Guantanamo detainees.

In addition, and more fundamentally, this is a case involving transfer of wartime alien detainees. Transfers are a traditional and lawful aspect of U.S. war efforts. When waging war, the United States captures and detains enemy combatants. The United States may hold enemy combatants for the duration of hostilities, and it of course may prosecute unlawful enemy combatants. *See Hamdi*, 542 U.S. at 518-19 (plurality opinion). At the conclusion of hostilities, the United States ordinarily transfers or releases lawful combatant detainees to their home countries. Most relevant in this case, when the United States determines during an ongoing war that an alien no longer needs to be detained or has been mistakenly detained – for example, if he is a non-combatant and not otherwise subject to confinement – the United States attempts to promptly transfer or release that detainee to his home country or a safe third country. *Cf.* Army Regulation 190-8 § 1-6(10)(c) (person who is captured and determined to be "innocent civilian should be immediately returned to his home or released"); *id.* §§ 3-11 to 3-14 (transfer and repatriation of prisoners of war); *id.* § 6-15 (transfer of civilian internees).[5]

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[5] The factual complication in this case arises because the United States will not send these Uighur detainees back to their home country of China, apparently because the Executive has concluded there is a likelihood of torture by China. *See* John B. Bellinger, III, U.S. State Dep't Legal Advisor, Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007). The detainees do not want to return to China for that same reason and thus support the Executive's decision. Yet these alien detainees

Throughout the 20th Century, the United States transferred or released hundreds of thousands of wartime alien detainees – some of whom had been held in America – back to their home countries or, in some cases, to other nations.[6] Those transfer and exchange decisions rested then – as they do now – on confidential information, promises, and negotiations. They involved predictive, expert judgments about conditions in a foreign country and related matters. Given those sensitivities, as well as the delays and burdens associated with obtaining judicial pre-approval of transfers and transfer agreements, it comes as no surprise that war-related transfers traditionally have occurred without judicial oversight. *See Boumediene*, 128 S. Ct. at 2248-49 (negotiated exchange of prisoners was "a wartime practice well known to the Framers," and "[j]udicial intervention might have complicated" those negotiations). As both

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also have no constitutional or statutory right to enter the United States. Assuming the Executive has the authority to bring them into the United States, the Executive has thus far declined to do so. And the Executive apparently has not yet found a safe third country willing to accept them.

[6] *See generally* George G. Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, DEP'T OF THE ARMY PAMPHLET NO. 20-213, at 46, 177, 201-204, 240-43, 247, 258-60 (1955), http://cgsc.cdmhost.com; Raymond Stone, *The American-German Conference on Prisoners of War*, 13 AM. J. INT'L L. 406 (1919); Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA L. REV. 51 (1946); Mark Elliott, *The United States and Forced Repatriation of Soviet Citizens, 1944-47*, 88 POLITICAL SCIENCE QUARTERLY 253 (1973); Howard S. Levie, *How It All Started – And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205 (2002); U.S. DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 661-73, 703-08 (1992), http://www.ndu.edu.

history and modern practice demonstrate, the capture, detention, possible trial, and eventual transfer or release of combatants – as well as the transfer or release of those mistakenly detained during wartime – are all necessary and traditional incidents of war implicating compelling governmental interests. *See Hamdi*, 542 U.S. at 518-19 (plurality opinion); *cf.* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

In short, *Munaf* and the extradition cases have already weighed the relevant due process considerations regarding transfers. They have established that "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Munaf*, 128 S. Ct. at 2226. And the "Judiciary is not suited to second-guess such determinations." *Id.* In light of those precedents, it would be quite anomalous for courts, absent congressional direction, to second-guess such Executive assessments in these war-related transfer cases, where the governmental interest is at least as compelling and the individual interest in avoiding mistreatment is the same. *See Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 194-95 (D.D.C. 2005) (Bates, J.); *see generally The Supreme Court, 2008 Term – Leading Cases*, 122 HARV. L. REV. 415 (2008) (analyzing *Munaf* and collecting authorities).

Third, I respectfully offer a few comments about the dissent.

The dissent does not address the fundamental issue raised in this appeal: whether the Constitution's Due Process Clause (or the Foreign Affairs Reform and

Restructuring Act, *see* Maj. Op. at 9-10) requires judicial reassessment of the Executive's determination that a detainee is not likely to be tortured by a foreign nation – and whether, in order to ensure such a judicial inquiry, the Government must notify the district court before transfer. Rather, the dissent discusses a question that was not raised by the parties and fashions a new legal rule seemingly out of whole cloth. According to the dissent, a court must prevent a transfer of an alien detainee to a foreign nation's custody if it concludes that prosecution or detention by the foreign nation would also amount to continued detention "on behalf of the United States." Dis. Op. at 3. The detainees did not advance that position in their 104 pages of briefing in this Court (except perhaps an ambiguous reference at the tail end of one sentence in a supplemental brief). Nor did the detainees raise the point during two lengthy oral arguments in this Court. And because the detainees did not make the argument, the Government has not been able to address and respond to the dissent's novel approach.

In any event, I respectfully disagree with the dissent's theory. The Government represents that a foreign nation's prosecution or detention in the wake of a transfer to that nation's custody would take place "pursuant to its own laws." Waxman Decl. ¶ 5. Under the principles of *Munaf*, that declaration suffices to demonstrate that the proposed transfer of an alien to the custody of a foreign nation is not the same thing as the U.S. Government's maintaining the detainee in U.S. custody.[7]

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[7] A quite different issue arises, of course, when the United States maintains physical custody of an alien detainee but moves him

The dissent cites no precedent – none – requiring or allowing a court to review a proposed transfer and assess whether custody of such an alien by a foreign nation would somehow also amount to custody "on behalf of the United States." The dearth of citations is noteworthy, particularly given that transfers of inadmissible or removed aliens to the custody of foreign nations have long occurred in the immigration context.

Furthermore, the dissent does not define or explain its proposed standard. What does "on behalf of the United States" mean in the context of a foreign nation's custody of an alien detainee? Does that concept apply to any negotiated transfer of an alien detainee? Does the dissent mean to prevent transfer from Guantanamo whenever the United States seeks or becomes aware of prosecution or detention of an alien by the receiving country pursuant to that country's laws? The dissent does not say.

The dissent in places seems to imply that an alien who is not an enemy combatant is perforce not dangerous, as that term is used in immigration practice, and that prosecution or detention by a foreign nation after transfer therefore would be improper, at least if the United States were aware of or encouraged it beforehand. But no authority is cited to support such a conclusion or the extraordinary judicial role it portends in connection with the Nation's foreign and

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after he has filed his habeas petition from a place where habeas applies (such as Guantanamo) to a place where the writ does not extend for aliens (such as a U.S. military base in Germany). *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 440-41 (2004); *Ex parte Endo*, 323 U.S. 283, 306 (1944).

immigration policies and international negotiations. *Cf. Munaf*, 128 S. Ct. at 2223 ("Habeas does not require the United States to keep an unsuspecting nation in the dark when it releases an alleged criminal insurgent within its borders."); *Demore v. Kim*, 538 U.S. 510, 522 (2003) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government") (internal quotation marks omitted); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations") (internal quotation marks omitted).

Moreover, the dissent's theory necessarily would require some judicial review of a foreign nation's legal practices and procedures. But that would contravene the longstanding principle reiterated by the Supreme Court in *Munaf*: "Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." 128 S. Ct. at 2225.

Nor does the dissent explicate how its regime would work procedurally. For instance, would the Judiciary require questioning of the American and foreign officials who negotiated the transfer? Would it mandate disclosure of confidential nation-to-nation documents? Presumably so. But absent congressional direction otherwise, courts traditionally are wary of wading so deeply into this Nation's negotiations and

agreements with foreign nations. *Cf. Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Courts have a responsibility to decide war-related cases with as much clarity and expedition as possible. Especially in this sensitive area, our holdings and opinions should strive to be readily understandable to the political branches that have to make critical wartime decisions. The dissent's uncertain "on behalf of" standard likely would create years of case-by-case litigation as the courts and the political branches grapple with what it means and how it applies to a given U.S. negotiation with a foreign nation about transfer of a wartime alien detainee.

In my respectful judgment, the dissent's theory does not advance a proper ground, absent congressional direction, for a judge to prevent the transfer of Guantanamo detainees to the custody of a foreign nation. And thus I fully agree with the opinion of the Court that the dissent's argument provides no basis in this case for the court to second-guess the Executive's proposed transfer of these alien detainees. *See* Maj. Op. at 11-12 n.*.

* * *

The opinion of the Court correctly concludes that, under current law, the U.S. Government may transfer Guantanamo detainees to the custody of foreign nations without judicial intervention – at least so long as the Executive Branch declares, as it has for the Guantanamo detainees, that the United States will not transfer "an individual in circumstances where torture is likely to result." *Munaf*, 128 S. Ct. at 2226.

GRIFFITH, *Circuit Judge*, concurring in the judgment in part and dissenting in part: Nine detainees ask us to affirm district court orders requiring the government to provide thirty days' notice of their transfers from Guantanamo Bay. I share the majority's concern that requiring such notice limits the government's flexibility in a sensitive matter of foreign policy. Nevertheless, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court rejected this court's view of the reach of the writ of habeas corpus and extended its protections to those held at Guantanamo Bay. Since at least the seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond its reach where they would be subject to continued detention on behalf of the government. Because this protection applies to the petitioners, the critical question before us is what process a court must employ to assess the lawfulness of their proposed transfers. Based on its reading of *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the majority finds sufficient the government's representations that no transfer will result in continued detention on behalf of the United States. I write separately because I do not believe *Munaf* compels absolute deference to the government on this matter, and I believe the premise of *Boumediene* requires that the detainees have notice of their transfers and some opportunity to challenge the government's assurances. Accordingly, I would affirm the district court orders.

I.

I agree with the majority that the district court has subject matter jurisdiction to hear the detainees' challenges to their transfers. I am less certain than the majority, however, that there remains a statutory

basis to hear these claims after *Boumediene*. The majority opinion in *Boumediene* said nothing about whether statutory habeas for the Guantanamo detainees survived the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, and at least three Justices were of the view it did not. *See Boumediene*, 128 S. Ct. at 2278 (Souter, J., concurring, joined by Ginsburg & Breyer, JJ.) (noting that Congress "eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all"). Statutory habeas may in fact exist for these detainees and cover claims against unlawful transfer, but for now this remains an open question, and the Constitution provides a more sure footing for jurisdiction.

The bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas. "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)). Because the Habeas Corpus Act of 1679 "was the model upon which the habeas statutes of the 13 American Colonies were based," *Boumediene*, 128 S. Ct. at 2246; *see* Dallin H. Oaks, *Habeas Corpus in the States, 1776–1865*, 32 U. CHI. L. REV. 243, 252 (1965) (explaining the "close conformity of most state legislation to the English Habeas Corpus Act of 1679"), the Supreme Court has looked to the 1679 Act to determine the contours and content of constitutional habeas, *see, e.g.*, *Boumediene*, 128 S. Ct. at 2245–47; *Hamdi v. Rumsfeld*, 542 U.S. 507, 557–58 (2004) (Scalia, J., dissenting); *Peyton v. Rowe*, 391 U.S. 54, 58–59 (1968). Section 12 of the 1679 Act included

a prohibition against the transfer of prisoners to places where the writ did not run. *See* Habeas Corpus Act, 1679, 31 Car. 2, c.2, § 12 (Eng.) ("[N]o subject . . . may be sent . . . into parts, garrisons, islands or places beyond the seas . . . within or without the dominions of his Majesty . . . ."); *see also Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting) ("The possibility of evading judicial review through such spiriting-away was eliminated, not by expanding the writ abroad, but by forbidding (in Article XII of the Act) the shipment of prisoners to places where the writ did not run or where its execution would be difficult."); Oaks at 253 ("The act also prohibited sending persons to foreign prisons (§ 12)."). Because *Boumediene* extended constitutional habeas to the Guantanamo detainees, *see* 128 S. Ct. at 2240 (holding that petitioners "have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause"), we should acknowledge that jurisdiction to hear the petitioners' claims against unlawful transfer—a fundamental and historic habeas protection—is grounded in the Constitution.

II.

Transfer to continued detention on behalf of the United States in a place where the writ does not reach would be unlawful and may be enjoined. The question we must consider is what process courts must use to determine whether the government's proposed transfers run afoul of that bar. The majority holds that the district court must defer to the Executive's sworn representations that transfer to the physical custody of a foreign government will not involve continued detention on behalf of the United States. Majority Op. at 12– 13. But this will leave the petitioners without

any opportunity to challenge the accuracy of the government's sworn declarations. Although prudential concerns may justify some flexibility in fashioning habeas relief, *see Boumediene*, 128 S. Ct. at 2267 (noting that "common-law habeas corpus was, above all, an adaptable remedy"), such innovations must not strip the writ of its essential protections. *See id.* at 2276 ("Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.").

Fundamental to a prisoner's habeas rights is the government's duty to appear in court to justify his detention. At its most basic level, habeas "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account." *Id.* at 2247; *see Peyton*, 391 U.S. at 58 ("The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law."). To vindicate the detainees' habeas rights, *Boumediene* requires the court to "conduct a meaningful review" of the government's reasons for the detention, which includes, at the very least, the rudimentaries of an adversary proceeding. 128 S. Ct. at 2268–69 (for the "writ [to] be effective . . . [t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," typically through "a fair, adversary proceeding"); *see also id.* at 2269 (identifying as a critical deficiency in the CSRT process the "constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy

combatant"). Calling the jailer to account must include some opportunity for the prisoner to challenge the jailer's account.

Here the nine detainees claim their transfers may result in continued detention on behalf of the United States in places where the writ does not extend, effectively denying them the habeas protections *Boumediene* declared are theirs. *See, e.g.*, Appellees' Supp. Br. at 4–5 (arguing that habeas "extends to ensuring that any proposed 'release'" would not result in "continued unlawful detention in a location beyond the jurisdiction of the district court . . . in coordination with[] or at the behest of the United States"); Appellees' Supp. Resp. Br. at 5–6; Application for Prelim. Inj. at 7, 9–10, *Kiyemba v. Bush*, No. 05-1509 (D.D.C. Sept. 9, 2005). The stakes of unlawful custody, which led the Court in *Boumediene* to extend habeas protections to the detainees in the first place, are no higher than the stakes of unlawful transfer. Indeed, because an unlawful transfer will deny the detainees any prospect of judicial relief, protecting their habeas rights in this context is vital.

It is significant that the government has submitted sworn declarations assuring the court that any transfer will result in release from U.S. authority. If the government's representations are accurate, each transfer will be lawful, for in habeas the only relevant judicial inquiry about a transfer is whether it will result in continued detention on behalf of the United States in a place where the writ does not run. But as we recently noted in another case involving the scope of habeas protections for detainees at Guantanamo Bay, a "naked declaration cannot simply resolve the issue." *Al-Odah v. United States*, No. 05-5117, slip op.

at 10 (D.C. Cir. Mar. 6, 2009) (per curiam) (rejecting "the government's suggestion that its mere certification—that the [classified] information redacted from the version of the [document] provided to a detainee's counsel do[es] not support a determination that the detainee is *not* an enemy combatant—is sufficient to establish that the information is not material" (internal quotation marks omitted)); *see id.* at 11 ("[I]t is the [habeas] court's responsibility to make the materiality determination itself."). Critical to ensuring the accuracy of the government's representations is an opportunity for the detainees to challenge their veracity. The rudimentaries of an adversary proceeding demand no less. *See Boumediene*, 128 S. Ct. at 2273 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court."). When an individual entitled to habeas protections faces the prospect of continued detention—be it by the United States at Guantanamo Bay or on its behalf after transfer to a foreign nation—he must be afforded some opportunity to challenge the government's case.

Relying solely on the government's sworn declaration and despite the petitioners' claims to the contrary, the majority insists that this case is not about possible continued detention by a foreign nation on behalf of the United States. Majority Op. at 11–12. But the majority makes too much of what the government has actually said. The government has stated only that transfer to a foreign nation will result in release of the detainees from the physical custody of the United States. *See* Declaration of Matthew C. Waxman, Deputy Assistant Sec'y of Def. for Detainee

Affairs 2–3 (June 2, 2005). The declaration expressly left open the possibility that a foreign nation will continue detention of the petitioners. *See id.* at 2 ("[T]he United States also transfers GTMO detainees, under appropriate circumstances, to the control of other governments for continued detention . . . ."). The possibility of continued detention by a foreign nation on behalf of the United States after a transfer is the very issue we must address. Although the status of these detainees has been put to an adversarial process, whether their transfers will be lawful has not. I do not see how the court can safeguard the habeas rights *Boumediene* extended to these detainees without allowing them to challenge the government's account.[1]

Munaf is not to the contrary. The majority makes much of its language that courts may not "second-guess" the government's determinations, but it overlooks a significant difference between that case and ours: the *Munaf* petitioners knew in advance that the government intended to transfer them to Iraqi authorities and had the opportunity to demonstrate that such a transfer would be unlawful. There was no need for the *Munaf* Court to consider an issue at the center of this dispute: whether notice is required to

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[1] Because this case should be governed by *Boumediene*'s extension to the detainees of habeas protections that include the bar against unlawful transfer, I view the issues of interest to Judge Kavanaugh in his concurring opinion as inapposite. For example, whether the Due Process Clause of the Fifth Amendment reaches these detainees is simply not part of the inquiry required in this case. The critical issue is whether the petitioners' habeas rights permit them to offer evidence that their proposed transfers will result in continued detention by a foreign nation on behalf of the United States.

prevent an unlawful transfer. In considering the *Munaf* petitioners' request to enjoin their transfers, the district court had the benefit of competing arguments from the petitioners and the government for each specific transfer. *See* 128 S. Ct. at 2226 (emphasizing that the government had considered and determined that the petitioners, Shawqi Ahmad Omar and Mohammad Munaf, would be treated adequately by Iraq's Justice Ministry and the prison where they would be held); *see also Omar v. Harvey*, 416 F. Supp. 2d 19, 28 (D.D.C. 2006) (stating petitioner's reasons for seeking an injunction barring transfer); Petition for Writ of Habeas Corpus at 7, *Munaf v. Harvey*, No. 06-1455 (D.D.C. Aug. 18, 2006) (same). Although the Supreme Court rightly gave substantial weight to the government's determination that the proposed transfer was lawful, the petitioners were at least permitted to argue otherwise. The *Kiyemba* petitioners should be afforded the same opportunity.

Other factual and legal differences limit *Munaf*'s applicability to our case. Critical to *Munaf*'s holding was the need to protect Iraq's right as a foreign sovereign to prosecute the petitioners. *See* 128 S. Ct. at 2221 ("[O]ur cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil."). No such interest is implicated here. The Court also emphasized Iraq's status as an ally and the fact that the petitioners had voluntarily traveled to Iraq to commit crimes during ongoing hostilities. *See id.* at 2224–25. Again, nothing similar is involved in this case. Perhaps most important, the *Munaf* petitioners sought a unique type of relief, as the Court stressed:

> [T]he nature of the relief sought by the habeas petitioners suggests that habeas is not appropriate in these cases. Habeas is at its core a remedy for unlawful executive detention. . . . At the end of the day, what petitioners are really after is a court order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within that sovereign's borders.

Id. at 2221. Given the significant differences between the circumstances of *Munaf* and this case, we are not required to hold that courts are foreclosed from exercising their habeas powers to enjoin a transfer without some opportunity for a detainee to challenge the government's representation that his transfer will be lawful.

III.

In the end, I would add only one element to the process the majority concludes is sufficient for considering the petitioners' transfer claims. But it is, I believe, a fundamental element called for by the Great Writ. The constitutional habeas protections extended to these petitioners by *Boumediene* will be greatly diminished, if not eliminated, without an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 05-1509 (RMU)
Documents No.: 2, 3, 5

[Filed September 13, 2005]

JAMAL KIYEMBA *et al.*	)
	)
Petitioners/	)
Plaintiffs,	)
	)
v.	)
	)
GEORGE W. BUSH *et al.*,	)
	)
Respondents/	)
Defendants	)
	)

MEMORANDUM ORDER

DENYING THE PETITIONER'S MOTION FOR AN ORDER TO SHOW CAUSE; GRANTING THE PETITIONER'S MOTION FOR ENTRY OF A PROTECTIVE ORDER; GRANTING THE RESPONDENTS' MOTION FOR STAY; ORDERING 30 DAYS' NOTICE OF ANY INTENT TO MOVE PETITIONERS

This matter comes before the court on the petitioners' motion for an order to show cause, for entry of a protective order and for issuance of a preliminary injunction, and on respondents' motion to stay proceedings pending related appeals and for continued coordination. On January 19, 2005, Judge Leon issued opinions in *Khalid v. Bush* and *Boumediene v. Bush* granting the government's motion to dismiss petitions for writ of habeas corpus brought by detainees at the United States Naval Station at Guantanamo Bay, Cuba ("GTMO"). *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). On January 31, 2005, Judge Green issued an opinion in *In re Guantanamo Cases*, granting in part and denying in part the government's motion to dismiss in eleven cases consolidated for the purpose of that motion. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). The petitioners in the above cases filed notices of appeal, and the D.C. Circuit has yet to issue an opinion. Accordingly, the state of the law in this circuit concerning the habeas rights of GTMO detainees is unclear. In addition, the government points to the inefficiency of resolving the merits of the instant habeas petition prior to the D.C. Circuit issuing a ruling that will cover similar matters. Respondents' Mot. to Stay at 19.

The government is well aware of this court's concern that the government may remove the petitioners from GTMO in the near future, thereby divesting (either as a matter of law or *de facto*) the court of jurisdiction. Such an outcome would abuse the processes now put in place for the purpose of adjudicating matters on their merits. *See Rasul v. Bush*, 124 S.Ct. 2686 (2004). Accordingly, the court cannot allow such a scenario to unfold; the court will

"guard against depriving the processes of justice of their suppleness of adaptation to varying conditions." *Landis v. North Am. Co.*, 299 U.S. 248, 256 (1936). Coextensive with the district court's inherent power to stay proceedings is the court's power to craft a stay that balances the hardships to the parties. *Id.* at 255 (noting concerns regarding the stay causing "even a fair possibility . . . [of] damage to some one else"); *see also Clinton v. Jones*, 520 U.S. 681, 707 (1997) (noting that "burdens [to the parties] are appropriate matters for the District Court to evaluate in its management of the case").

Accordingly, it is this 13th day of September, 2005,

ORDERED that the petitioner's motion for an order to show cause is **DENIED**;

ORDERED that the respondents' motion for stay is **GRANTED**; and it is

FURTHER ORDERED that the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, may not remove the petitioners from GTMO unless this court and counsel for petitioners (if counsel has been appointed or retained) receive thirty days' advance notice of such removal; and it is

FURTHER ORDERED that the court **ENTERS** by way of reference the protective ordered previously entered in the other Guantanamo detainee cases. *E.g.*, Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base

in Guantanamo Bay, Cuba, *In re Guantanamo Detainee Cases*, No. 02-0299 (D.D.C. Oct. 8, 2004).

SO ORDERED.

RICARDO M. URBINA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 05-1602 (ESH)

[Filed September 30, 2005]

EDHAM MAMET, et al.	)
	)
Petitioners,	)
	)
v.	)
	)
GEORGE W. BUSH, et al.,	)
	)
Respondents.	)
	)

MEMORANDUM ORDER

Petitioner Edham Mamet has been held as a prisoner at the United States Naval Station, Guantanamo Bay, Cuba ("Guantanamo") for more than three years. He is believed to be a Muslim Uighur, an ethnic minority repressed by the Chinese government. (*See* Pets.' Mot. for a Prelim. Inj. ["Pets.' Mot."] at 2, 32.) Whereas a number of Uighars detained in Guantanamo as "enemy combatants" have been exonerated, *see Qassim v. Bush*, Mem. Order, Civ. No. 05-497 (JR) (D.D.C. August 19, 2005), Mamet's status remains that of an "enemy combatant." (*See* Resps.'

Mot. to Stay, Decl. of Joseph S. Imburgia, attach.). Nevertheless, petitioners are concerned that Mamet faces imminent transfer to his homeland of China or to another country that will subsequently repatriate him to China.

Presently before the Court is respondents' motion to stay pending related appeals [#6] and petitioners' motion for a preliminary injunction [#7]. Specifically, petitioners request that the Court enjoin the government from transferring Mamet from Guantanamo to any other location absent thirty days advance written notice to petitioner and his counsel. (Pets.' Mot. at 1.) They argue that, given the Chinese government's known abuse of Uighurs (*see* Pets.' Mot., Ex. 1 at 2, 32), "any rendition of Petitioner to his homeland of China would be disastrous." (*Id.* at 6.) Petitioners cite evidence of China's "particularly harsh" treatment of Uighurs-- including prolonged detention and executions-- even, in one case, where a Uighur had been granted refugee status upon his forcible repatriation from Nepal. (*Id.* at 6; *id.*, Ex. 1 at 32.) They note that an ostensible "'release' to China may be the functional equivalent of continued detention and torture" (*id.* at 10 n.2) and also fear release to a country that will "collapse under pressure from the Chinese government to repatriate them to China." (*Id.* at 3.)

It is hereby

ORDERED that petitioners' motion for a preliminary injunction is **DENIED**. It is further

ORDERED that respondents' motion to stay is **GRANTED** and *Mamet v. Bush*, No. 051602, is

STAYED pending resolution of all appeals in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), and *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). This stay shall not, however, prevent the parties from availing themselves of the procedures set forth in the Protective Order entered by this Court on September 15, 2005 [#4], nor shall it bar the filing or disposition of any motion for emergency relief.

As a condition of the stay, it is further **ORDERED** that respondents shall file notice with the Court 30 days prior to any transfer of Mamet to a foreign country. Such notice will include the proposed country and date of transfer. *See Kiyemba v. Bush*, Civ. No. 1509 (RMU) (D.D.C. Sept. 13, 2005) (requiring notice to Court and counsel prior to transfer as condition of stay); *Deghayes v. Bush*, Civ. No. 04-2215 (RMC) (D.D.C. June 15, 2005) (requiring notice to Court prior to transfer to Libya given reported use of torture in Libyan prison system and United States' lack of assurance that petitioner would not be transferred there).

It is further **ORDERED** that, to ensure that the proceedings can continue in an orderly fashion in the event that the detainees prevail on appeal, respondents shall provide factual returns to Mamet's counsel within 90 days of the date of this Order.

s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: September 30, 2005

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5487
Consolidated with 05-5489

September Term 2008
05cv01509

[Filed July 27, 2009]

Jamal Kiyemba, Next Friend, et al.,	)
	)
Appellees	)
	)
v.	)
	)
Barack Obama, President of the United States, et al.,	)
	)
Appellants	)
	)

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers,* Tatel,* Garland, Brown, Griffith,* and Kavanaugh, Circuit Judges

* Circuit Judges Rogers, Tatel, and Griffith would grant the petition for rehearing en banc.

ORDER

Appellees' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5487
Consolidated with 05-5489

September Term 2008
05cv01509

[Filed July 27, 2009]

Jamal Kiyemba, Next Friend, et al.,	)
	)
Appellees	)
	)
v.	)
	)
Barack Obama, President of the United States, et al.,	)
	)
Appellants	)
	)

BEFORE: Ginsburg, Griffith,* and Kavanaugh, Circuit Judges

ORDER

* Circuit Judge Griffith would grant the petition.

Upon consideration of appellees' petition for panel rehearing filed on May 22, 2009, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F

U.S. CONST. Article I, Section 9, clause 2 states:
The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST. Amend. V states in part:
No person shall . . . be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 1651 states in part:
The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2241 states:
(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may

transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-2215 (RMC)

[Filed June 14, 2005]

OMAR DEGHAYES, *et al.*,	)
	)
Petitioners,	)
	)
v.	)
	)
GEORGE WALKER BUSH, *et al.*,	)
	)
Respondents.	)
	)

ORDER

The United States military has detained Omar Deghayes, Shaker Aamer, and Jamal Kiyemba ("Petitioners") and is holding them at a facility in Guantanamo Bay, Cuba. These men have filed a Petition for Writ of *Habeas Corpus* ("Petition") in this Court. This Petition raises many of the same legal issues now under consideration by the D.C. Circuit Court of Appeals on earlier *habeas* petitions filed by

other detainees.[1] At the request of the United States, this case has been stayed.

Pending before the Court is a motion for a preliminary injunction to enjoin the United States from transferring or removing the Petitioners to "hostile foreign authorities" without thirty-days' advance notice to their counsel and an adequate opportunity to be heard. *See* Supplemental Memorandum in Support of Motion for a Preliminary Injunction at 1. Similar motions have been presented to other Judges of the Court, some of whom have granted injunctive relief, *see, e.g., Al-Joudi v. Bush*, No. 05-301 (GK), 2005 U.S. Dist. LEXIS 6265, at *22 (D.D.C. April 4, 2005), some of whom have ordered advance notice without an accompanying injunction, *see, e.g., Kurnaz v. Bush*, No. 04-1135 (ESH), 2005 U.S. Dist. LEXIS 6560, at *9 (D.D.C. April 12, 2005), and some of whom have denied the motions in their entirety, *see, e.g., Al-Anazi v. Bush*, No 05-345 (JDB), 2005 WL 1119602, at *11 (D.D.C. April 21, 2005). The United States urges the Court to deny the motion in its entirety.

BACKGROUND

Although not British citizens, the Petitioners are long-term residents of the United Kingdom who wish to be released and returned to Britain. They have been in the custody of the United States for over three years and are currently held at Guantanamo Bay Naval Station ("Guantanamo"), Cuba.

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[1] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

The facts in support of their motion for a preliminary injunction are presented by counsel and are not supported by sworn affidavit. The United States does not explicitly contest the facts as presented but, rather, argues that they are not supported by competent evidence.

According to counsel, Mr. Deghayes's father was assassinated by the Libyan government. *See* Motion and Memorandum for Preliminary Injunction, for Expedited Discovery on Relevant Issues, and Opposition to Blanket Stay of Proceedings ("Pets' Mot.") at 6. Afterwards, his family left Libya and obtained political asylum in England. *Id.* After completing his education in Britain, Mr. Deghayes traveled to Afghanistan where he met and married an Afghani woman. Petition ¶ 30. At the beginning of the war in Afghanistan, he took his family to Pakistan. *Id.* ¶ 31. While in Pakistan, "some people broke into their house because . . . [t]here were bounties at the time for seizing 'foreign Taliban' and apparently they sold him to the Americans as that." *Id.* ¶ 32. Mr. Deghayes alleges that he was tortured and abused both before and after the Pakistanis transferred him to U.S. control. Most particularly, counsel asserts that U.S. military personnel took Mr. Deghayes from his prison at Guantanamo on September 9 and 11, 2004 to a location where he was interrogated and threatened by four Libyans associated with the government of Muammar Qadhafi. Mr. Deghayes asserts that the Central Intelligence Agency ("CIA") brought the Libyans to Guantanamo to threaten him and other detainees. Pets' Mot. at 7. The Libyans accused Mr. Deghayes of anti-Qadhafi activities and allegedly told him that he would "be brought to judgment in Libya." *Id.* at 11-12. "In here I cannot do anything, but if I

meet you [later] I will kill you, if you don't kill me." *Id.* Counsel for Mr. Deghayes tells the Court that he is a sophisticated man, trained as a lawyer in Britain, and that his case is being championed in the U.K. by the Law Society.

Counsel states that Shaker Aamer was born in Saudi Arabia but has applied for British citizenship. *Id.* at 17. He is a long-term resident of Britain, is married to a British national, and has four British children. He provides no explanation for why he, his pregnant wife, and three children were in Afghanistan when the war began. Mr. Aamer provides a lengthy description of abuse at the hands of American military personnel in Afghanistan and, to a lesser extent, in Guantanamo. *Id.* at 18-20. He fears return to Saudi Arabia because he faces imprisonment for marrying a foreigner and for being absent from the country without the government's permission. In addition, he fears that, because the United States has erroneously informed Saudi Arabia that he is a terrorist, he will be subject to torture if returned to his native country. *Id.* at 21.

Counsel states that Jamal Tony Kiyemba was born in Uganda but moved to Britain when he was thirteen or fourteen years old. *Id.* at 21-22. He was educated in Britain and has family there. Mr. Kiyemba was seized in Pakistan, *id.* at 23 n.11, and transferred to Guantanamo where he alleges that U.S. military personnel abused him. *Id.* at 25. He fears persecution if he is returned to Uganda because he is a Muslim. Mr. Kiyemba also claims that his interrogators have threatened to send him to Egypt, where "our Egyptian friends who are renowned for torturing . . . will do the dirty work for us." *Id.* at 25.

ANALYSIS

In *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004), the Supreme Court held that federal courts have jurisdiction to determine the legality of the ongoing detention of petitioners held in Guantanamo. Accordingly, the Court must also have authority to preserve this jurisdiction if it can be shown that the United States is acting to circumvent it. *See* All Writs Act, 28 U.S.C. § 1651(a) (2001); *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996) (All Writs Act "empowers a district court to issue injunctions to protect its jurisdiction"); *Lindstrom v. Graber*, 203 F.3d 470, 474-76 (7th Cir. 2000) (All Writs Act permits court to stay extradition pending appeal of habeas corpus petition). *See also* FED.R.APP.P. 23(a); *Jago v. United States Dist. Court*, 570 F.2d 618, 626 (6th Cir. 1978) (Rule 23(a) preserves the district judge's authority to issue order regarding custody of prisoner pending review of habeas petition).[2]

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[2] The Court references Rule 23(a) of the Federal Rules of Appellate Procedure as a basis for its jurisdiction here because this case is stayed, at the specific request of the United States, so that the fundamental legal issues it raises can be resolved in the context of other cases already on appeal. Where petitioners are prevented by the Court's stay from continuing to pursue their cases for the convenience and efficiency of the United States and the courts and where the fundamental legal issues that will be decided in the cases on appeal will guide this Court's decision, the legal position of these Petitioners may be construed as sufficiently "on appeal" as to be covered by Rule 23(a). The United States argues that it relinquishes custody and does not "transfer" custody within the meaning of Rule 23(a) when it returns a detainee to his home country. Given the disposition of the motion, the Court does not need to address this argument.

The parties appear to agree that if a detainee is transferred to a foreign nation with no further control by the United States, the Court would lose its jurisdiction. The United States explains:

> [The Department of Defense ("DoD")] has no interest in detaining enemy combatants longer than necessary . . . . Where continued detention is deemed no longer necessary, a detainee may be transferred to the control of another government for release. Furthermore, the United States also transfers [Guantanamo] detainees, under appropriate conditions, to the control of other governments for investigation and possible prosecution and continued detention when those governments are willing to accept responsibility for ensuring, consistent with their laws, that the detainees will not continue to pose a threat to the United States and its allies. Such governments can include the government of a detainee's home country, or a country other than the detainee's home country that may have law enforcement or prosecution interest in the detainee . . . .
>
> Of those 65 detainees who have been transferred to the control of other governments, [as of March 8, 2005] 29 were transferred to Pakistan, 9 to the United Kingdom, 7 to Russia, 5 to Morocco, 6 to France, 4 to Saudi Arabia, 1 to Denmark, 1 to Spain, 1 to Sweden, 1 to Kuwait, and 1 to Australia.
>
> When the DoD transfers [Guantanamo] detainees to the control of other governments, the DoD does not ask or direct the receiving

> government to detain the individual on behalf of the United States. Accordingly, the detainees are no longer subject to the control of the United States once they are transferred.

First Declaration of Matthew C. Waxman ("1st Waxman Decl.") ¶¶ 3 - 5. Pursuant to the specific direction of the U.S. Senate when it adopted the Convention Against Torture ("CAT"),[3] it is the policy of the United States not to transfer individuals to any country where it is more likely than not that they will be tortured. *See* Resolution of Ratification, 136 CONG. REC. S17486, S17492 (Oct. 27, 1990) ("The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention . . . . That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the convention, to mean 'if it is more likely than not that he would be tortured.'"); Declaration of Pierre-Richard Prosper ("Prosper Decl.") ¶ 8 ("The essential question in evaluating foreign government assurances is whether the competent Department of State officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred.").

The record is conspicuously barren of evidence that the United States plans to transfer Shaker Aamer or Jamal Kiyemba to their home countries. Although it

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[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

appears that at least four persons have been transferred to Saudi Arabia, there is no report that Mr. Aamer has been threatened with return to Saudi Arabia. Although counsel regards the Arab Republic of Egypt as a possible transfer destination, there is no evidence that Egypt would have a law enforcement or prosecution interest in Mr. Aamer. Similarly, Mr. Kiyemba states that he fears transfer to Uganda, a country which he asserts would subject him to torture because he is a Muslim. However, he provides no evidence that the United States has threatened to involuntarily repatriate him.[4] In fact, counsel reports no transfer threats of any kind directed toward Mr. Kiyemba.

Even more telling is the complete absence of evidence that the United States would transfer either Mr. Aamer or Mr. Kiyemba to a country that might use torture to question them as an agent of, or on behalf of, the United States. *Compare Abdah v. Bush*, No. 04-1254 (HKK) (RMC), 2005 U.S. Dist. LEXIS 4144 (D.D.C. Mar. 12, 2005) (sufficient evidence of record to raise a serious question of whether U.S. would transfer Yemeni nationals to a foreign country for questioning but retain control) *with Does 1-570 v.*

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[4] The paucity of evidence before the Court makes it impossible to assess the validity of Mr. Kiyemba's fear but, to the extent it is demonstrably true, such a transfer would appear to be against the specific policy of the United States. *See* Prosper Decl. at ¶ 4 ("Of particular concern to the Department of State in making recommendations on transfers is the question of whether the foreign government concerned will treat the detainee humanely . . . and will not persecute the individual on the basis of his race, religion, nationality, membership in a social group, or political opinion.").

Bush, No. 05-313 (CKK) (RMC), 2005 U.S. Dist. LEXIS 6417 (D.D.C. Mar. 13, 2005) (no evidence of record that specific petitioners were at immediate risk of transfer). Neither of these Petitioners presents sufficient evidence of direct harm, much less its imminency, to obtain the extraordinary remedy of a preliminary injunction against the United States.[5]

The analysis of Mr. Deghayes's situation is somewhat different. The United States neither admits nor denies that it transported Libyan nationals to Guantanamo Bay to threaten Mr. Deghayes. Instead, it says that,

> to the extent that is true, that Libyan agents came and interrogated Mr. Deghayes . . . , there [was] no threat of rendition that you know the Libyans are somehow going to arrange to have the petitioner[] sent to Libya. Rather, there [were] just kind of general threats about if you end up in Libya[,] we are going to get you. That kind of thing. And what we have at best is a hearsay allegation . . . . But in any event, the

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[5] The Court notes that counsel seek to minimize their requested remedy by describing it only as notice of a potential transfer. They also candidly admit that the purpose of such notice would be to allow counsel to assess the proposed transfer, seek discovery from the United States if they thought it necessary, and bring the issue to Court to seek to prevent a transfer they deemed injurious to their clients' interests. The lack of evidence to support their case counsels strongly against even beginning down that road by requiring prior notice of a transfer. Rather, the Court assumes, as it must, that the Waxman and Prosper Declarations fully describe the policy of the United States and that neither Mr. Aamer nor Mr. Kiyemba would be transferred to a country where it is more likely than not that they would be subject to torture.

> representations that might be made or threats that might be made by an agent of a foreign government I don't think that can be compared to the sworn declarations that have been provided by an Assistant Secretary of Defense as well as a United States Ambassador outlining the policy and practice of the United States.

Hearing Tr. at 17 - 18. The United States acknowledges that "Libya consistently is not that high on the human rights scale." *Id.* at 22. In fact, the U.S. Department of State in its 2004 Country Reports on Human Rights Practices, informed the Congress of the United States that,

> [t]he law [in Libya] does not prohibit [torture and cruel, inhuman, or degrading treatment or punishment], and there were reports that government officials employed them. Security personnel reportedly routinely tortured prisoners during interrogations or as punishment. Government agents reportedly detained and tortured foreign workers . . . .
>
> The reported methods of torture included: chaining prisoners to a wall for hours; clubbing; applying electric shock; applying corkscrews to the back; pouring lemon juice in open wounds; breaking fingers and allow the joints to heal without medical care; suffocating with plastic bags; deprivation of food and water; hanging by the wrists; suspension from a pole inserted between the knees and elbows; cigarette burns; threats of being attacked by dogs; and beating on the soles of the feet.

See U.S. Dep't of State, Country Reports on Human Rights Practices, Libya, § 1(c), Libya, *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41727.htm (last visited June 1, 2005). Despite this recent report, the United States has declined to give assurances to Mr. Deghayes that it would exercise its executive discretion and not transfer him to Libya. On the other hand, the United States informs the Court:

> Petitioners' unsworn story about an alleged encounter between petitioner Deghayes and four Libyan agents does not even purport to speak to what may be the intentions or plans to [sic] the United States officials who would be in charge of deciding on any transfer or repatriation, and, even if credited, hardly establishes that he is at risk of the United States sending him to Libya to be tortured or treated inhumanely. As is made abundantly clear in the attached brief and declarations, the United States does not transfer individuals to countries where it is more likely than not that they will be tortured.

Respondents' Memorandum in Opposition to Petitioners' Motion for Preliminary Injunction and Expedited Discovery at 4 n.4. The Court interprets this footnote as an informal signal that the United States will not transfer Mr. Deghayes to Libya, despite its official silence, because of the reported use of torture in the Libyan prison system. With this understanding, the request for prior notice before such a transfer becomes moot, as there is no evidence that any threat has been made to transfer Mr. Deghayes elsewhere or any evidence that the United States might transfer him elsewhere and retain some degree of control. To

ensure that the Court has not misread the intentions of the United States and specifically noting that the Court has no occasion to decide at this time whether a transfer of Mr. Deghayes to Libya could be subject to an injunction, the Court will direct the United States to file notice with the Court thirty days prior to any transfer of Mr. Deghayes to Libya.

In light of this disposition of the motion, the Petitioners' motion for expedited discovery will be denied. Pursuant to the suggestion of the United States, the Court will enter the December 13, 2004 supplementary order entered in the coordinated Guantanamo detainee cases, as well as a stop gap order, similar to the November 10, 2004 Order Addressing Designation Procedures for "Protected Information" in the coordinated cases, that provides for provisional treatment of designated information as protected while a request to the Court for such treatment is pending.

CONCLUSION

For these reasons, it is hereby

ORDERED that the Court **ENTERS** by way of reference the supplementary orders previously entered in *In re Guantanamo Bay Detainee Cases* by Judge Joyce Hens Green. These include the Order Addressing Designation Procedures for "Protected Information," entered on November 10, 2004, and the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, issued on December 13, 2004; and

It is further **ORDERED** that the Petitioners' motion for 30-days' prior notice of any transfer from Guantanamo Bay to "hostile foreign authorities" is **DENIED**; and

It is further **ORDERED** that the United States shall file notice with the Court 30 days prior to any transfer of Mr. Deghayes to Libya if there is a decision by the Department of Defense to transfer him to his home country; and

It is further **ORDERED** that the Petitioners' motion for expedited discovery is **DENIED.**

DATE: June 14, 2005.

/s/
ROSEMARY M. COLLYER
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 08-442 (TFH)

Civil Action Nos.

02-CV-0828, 04-CV-1136, 04-CV-1164, 04-CV-1194, 04-CV-1254, 04-CV-1937, 04-CV-2022, 04-CV-2035, 04-CV-2046, 04-CV-2215, 05-CV-0023, 05-CV-0247, 05-CV-0270, 05-CV-0280, 05-CV-0329, 05-CV-0359, 05-CV-0392, 05-CV-0492, 05-CV-0520, 05-CV-0526, 05-CV-0569, 05-CV-0634, 05-CV-0748, 05-CV-0763, 05-CV-0764, 05-CV-0833, 05-CV-0877, 05-CV-0881, 05-CV-0883, 05-CV-0889, 05-CV-0892, 05-CV-0993, 05-CV-0994, 05-CV-0995, 05-CV-0998, 05-CV-0999, 05-CV-1048, 05-CV-1124, 05-CV-1189, 05-CV-1220, 05-CV-1236, 05-CV-1244, 05-CV-1347, 05-CV-1353, 05-CV-1429, 05-CV-1457, 05-CV-1458, 05-CV-1487, 05-CV-1490, 05-CV-1497, 05-CV-1504, 05-CV-1505, 05-CV-1506, 05-CV-1509, 05-CV-1555, 05-CV-1590, 05-CV-1592, 05-CV-1601, 05-CV-1602, 05-CV-1607, 05-CV-1623, 05-CV-1638, 05-CV-1639, 05-CV-1645, 05-CV-1646, 05-CV-1649, 05-CV-1678, 05-CV-1704, 05-CV-1725, 05-CV-1971, 05-CV-1983, 05-CV-2010, 05-CV-2083, 05-CV-2088, 05-CV-2104, 05-CV-2112, 05-CV-2185, 05-CV-2186, 05-CV-2199, 05-CV-2200, 05-CV-2249, 05-CV-2349, 05-CV-2367, 05-CV-2371, 05-CV-2378, 05-CV-2379, 05-CV-2380, 05-CV-2381, 05-CV-2384, 05-CV-2385, 05-CV-2386, 05-CV-2387, 05-CV-2398, 05-CV-2444, 05-CV-2477, 05-CV-2479,

06-CV-0618, 06-CV-1668, 06-CV-1674, 06-CV-1684, 06-CV-1688, 06-CV-1690, 06-CV-1691, 06-CV-1758, 06-CV-1759, 06-CV-1761, 06-CV-1765, 06-CV-1766, 06-CV-1767, 07-CV-1710, 07-CV-2337, 07-CV-2338, 08-CV-987, 08-CV-1085, 08-CV-1101, 08-CV-1104, 08-CV-1153

[Filed July 11, 2008]

IN RE:	)
	)
GUANTANAMO BAY	)
DETAINEE LITIGATION	)
	)

ORDER

During the hearing held on July 8, 2008, petitioners' representative counsel requested that this Court order the government to provide petitioners' and the Court with 30 days' advance notice of any intended removal of a petitioner from detention at Guantanamo Bay, Cuba. Recognizing that issues pertaining to notice of removal and a court's power to enjoin the government from removing a detainee are currently pending before the United States Court of Appeals for the District of Columbia Circuit, *see Kiyemba, et al. v. Bush, et al.*, No. 05-5487 (consolidated), and *Abdah, et al. v. Bush et al.*, No. 05-5224 (consolidated), and that some Judges of this Court have entered such orders and others have not, the Court adopts the reasoning of those Judges who entered orders requiring notice and, therefore,

ORDERS that, in cases in which the petitioner requests such notice, the government shall file notice

with the Court 30 days prior to any transfer of a petitioner from Guantanamo Bay, Cuba.[1]

July, 10th, 2008

/s/
Thomas F. Hogan
United States District Judge

[1] Nothing in this order should be construed as a determination that this Court has the power to enjoin the government from transferring petitioners from detention at Guantanamo Bay, Cuba.

APPENDIX I

FILED WITH THE
COURT SECURITY OFFICER
CSO: Macisso
DATE: 10/9/08

REDACTED VERSION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No.: 08-0442 (TFH)
Civil Action Nos: 05-1509 (RMU)
05-1602 (RMU) 05-1704 (RMU)
05-2370 (RMU) 05-2398 (RMU)
08-1310 (RMU)
Document Nos.: 133, 134, 172

IN RE:	)
	)
GUANTANAMO BAY	)
DETAINEE LITIGATION.	)
	)

MEMORANDUM OPINION

GRANTING THE PETITIONERS' MOTIONS FOR JUDGMENT ON THEIR PENDING HABEAS PETITIONS AND DENYING AS MOOT THE PETITIONERS' MOTIONS FOR IMMEDIATE RELEASE ON PAROLE INTO THE UNITED STATES

I. INTRODUCTION

There comes a time when delayed action prompted by judicial deference to the executive branch's function yields inaction not consistent with the constitutional imperative. Such a time has come in the case of the 17 Uighurs in Guantanamo Bay, Cuba ("Guantanamo") whom the government has detained for 7 years without an opportunity for judicial redress until recently. In reviewing the evidence leading to the designation of one Uighur petitioner as an enemy combatant, the D.C. Circuit described the evidence supporting that determination as "lack[ing] sufficient indicia of. . . reliability." *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008). Prompted by the *Parhat* decision, the government decided that it would no longer consider the 17 Uighur detainees enemy combatants. In light of developments and the Supreme Court's recent ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), restoring the court's jurisdiction over detainee habeas petitions, the detainees filed motions alleging that their continued detention is unlawful and requesting that the court order the government to release them into the United States. Because the Constitution prohibits indefinite detention without just cause, this court rules that the government's continued detention of the petitioners is unlawful. Furthermore, because separation-of-powers concerns do not trump the very principle upon which this nation was founded – the unalienable right to liberty – the court orders the government to release the petitioners into the United States.

II. BACKGROUND

A. Factual Background

The 17 petitioners are Uighurs (a Turkic Muslim minority group) who arrived in Afghanistan after fleeing far-western China where they faced oppression. *See Parhat*, 532 F.3d at 837. Once in Afghanistan, the petitioners lived together in "Uighur camps." *Id.* The nature of these camps is hotly contested. The government contends that the camps were run by the East Turkistan Islamic Movement ("ETIM") and supported by the Taliban. Govt's Opp'n at 10. But the government has only produced evidence that one of the Uighurs was "part of or supporting forces" in Afghanistan. *Parhat*, 532 F.3d at 843 (stating that Parhat's own statements indicate that "he received training on a Kalashnikov rifle and a pistol, which 'consisted of weapon disassembly and cleaning'"). The *Parhat* court did not decide whether the camp was run by ETIM because the government's other evidence was independently insufficient to support the Combatant Status Review Tribunal's ("CSRT") determination that Parhat is an enemy combatant. *Id.* at 844 (explaining that the government's evidence that ETIM was "associated" with al Qaida or the Taliban and that ETIM engaged in hostilities against the United States or its allies "does not disclose from whence it came [and] is therefore insufficient"). The government concedes that there are no material factual differences among the petitioners and that the holding in *Parhat* applies to them all equally. Accordingly, this court recognizes that the petitioners acquired weaponry skills at "training camps" in Afghanistan after fleeing China, but will not draw adverse inferences based on other unsubstantiated allegations.

Although it remains unclear how long they remained in these "training camps," once the U.S. military began bombing the area, the petitioners relocated to Pakistan. *Id.* at 837. Local villagers there handed the petitioners over to Pakistani officials in late 2001. *Id.; but see* Joint Status Report (Aug. 18, 2008), Ex. 1 (noting that one petitioner was captured in May 2002). These officials then turned the petitioners over to the U.S. military for $5,000 a head. *Parhat*, 532 F.3d at 837; Uighur Petrs' Notice of Supp. Auth. (Sept. 25, 2008), Ex. E ("Decl. of J. Wells Dixon") at 3. In June 2002, the military transferred the petitioners to Guantanamo Bay. *Parhat*, 532 F.3d at 837.

B. Procedural History

The 17 Uighur detainees began filing habeas petitions with this court in July 2005. Approximately two years before filing their first petition, the government had already cleared 10 of the petitioners for release. Joint Status Report (Aug. 18, 2008), Ex. 1. The government cleared an additional 5 for release or transfer in 2005, 1 for transfer in 2006 and 1 for transfer in May of this year. *Id.* To date, all 17 petitioners remain at Guantanamo.

On July 10, 2008, Judge Thomas F. Hogan ordered that all the Uighur petitions be "consolidated for consideration before Judge Urbina." Order (July 10, 2008). Over the next few months, the government determined that it would treat all Uighur petitioners "as if they are no longer enemy combatants." Govt's Opp'n at 2; Joint Status Report (Aug. 18, 2008) at 14; Notice of Status (Sept. 30, 2008) at 2. As "no longer enemy combatants," the government provides these

detainees "special housing" "while efforts continue to resettle them in a foreign country." Notice of Status (Sept. 30, 2008) at 2.

Because the government no longer treats the detainees as enemy combatants, it will not be filing factual returns in any of their cases. Accordingly, the only issues to be resolved are whether the government has authority to "wind up" the petitioners' detention and whether the court has the authority to order the petitioners released into the United States. Parhat filed motions on July 23 and 25, 2008, requesting that the court release him into the United States pending final judgment of his habeas petition and also as the ultimate relief sought from his petition. The government opposed both motions. At a status hearing on August 21, 2008, the court granted a motion by 4 other petitioners to join the Parhat's pending motions, and on October 1, 2008, the remaining petitioners filed a motion incorporating by reference the arguments articulated in Parhat's motions.

III. ANALYSIS

A. Legality of Detention

1. Enemy Combatant Status

Congress passed the Authorization for Use of Military Force ("AUMF"), authorizing the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such

> organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

50 U.S.C. § 1541 note Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). Inclusive in this grant is the authority to detain individuals "who fought against the United States in Afghanistan for the duration of the particular conflict." *Boumediene*, 128 S. Ct. at 2240-41 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 588-89 (2004)). The Deputy Secretary of Defense issued an Order on July 7, 2004 setting forth an "enemy combatant" standard to assist military tribunals in deciding whether to detain someone caught in the theater of war. *Parhat*, 532 F.3d at 837-38 (reciting the military's definition of enemy combatant as "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners"). Thus far, this standard is the only one recognized by the Supreme Court for legally detaining individuals under the AUMF. *Hamdi*, 542 U.S. at 517.

In this case, because the government has already absolved the petitioners of this status, Govt's Opp'n at 5; Joint Status Report (Aug. 18, 2008); Govt's Notice (Sept. 30, 2008), its theory for continued detention is based on an inherent Executive authority to "wind up" detentions in an orderly fashion, Govt's Opp'n at 10. Initially, the petitioners protest that this "wind-up" authority, should it exist, would not apply to them because they were never lawfully detained. Petrs' Reply at 3. But the Supreme Court has made clear that habeas is not available "the moment a prisoner is taken into custody," *Boumediene*, 128 S. Ct. at 2275,

and in any event, the record is too undeveloped as to the circumstances regarding their transfer from Pakistan to United States custody to determine whether they were, at the time of their capture, lawfully detained, *see Qassim v. Bush*, 407 F. Supp. 2d 198, 200 (D.D.C. 2005) (expressing displeasure that "[t]he government's use of the Kafkaesque term 'no longer enemy combatants' deliberately begs the question of whether these petitioners ever were enemy combatants"). Accordingly, the court assumes, for the sake of this discussion, that the petitioners were lawfully detained and that the Executive does have some inherent authority to "wind up" wartime detentions.

2. "Wind-up" Authority

The parties strongly disagree over how long the Executive may detain individuals pursuant to its "wind-up" authority. The petitioners contend that the government determined long ago that it cannot effect transfer and after 5 years of failed efforts, any "wind-up" authority has been "used up." Petrs' Reply at 3. The government, on the other hand, recites examples of past wars in which the United States has detained prisoners of war for "several years" after the end of hostilities. Govt's Opp'n at 10-12 (noting the thousands of Iraqis held after the Gulf War, the 100,000 Chinese and Korean prisoners of war detained at the end of the Korean War, and the thousands of prisoners of war held after the end of World War II). The government then concludes that because it determined "only days ago to forego its option of attempting to conduct[] a new CSRT," that continued detention is constitutional. *Id.* at 12-13.

In a case addressing this same issue, the court in *Qassim* evaluated the appropriate length of detention under the Executive's "wind-up" authority by comparing the length of detention allowed under analogous immigration statutes. *Qassim*, 407 F. Supp. 2d at 201. Observing that the presumptive limit to detain an inadmissible or removable alien is 6 months, the court held unlawful the government's 9-month detention of the petitioners after determining that they were no longer enemy combatants. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Clark v. Martinez*, 543 U.S. 371 (2005)). The *Zadvydas* and *Clark* cases cited in *Qassim*, however, are not strictly analogous to the present inquiry. Both *Zadvydas* and *Clark* interpret an immigration statute as authorizing the government to detain aliens for 6 months – a presumptively reasonable period. *Clark*, 543 U.S. at 384-87. The Court chose not to read the statute to authorize indefinite detention because such a reading "would approach constitutional limits." *Id.* at 384. These constitutional limits, not the immigration statute, are at issue in this case.

The government argues that *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) provides a better read on the constitutional limits to detention than either *Zadvydas* or *Clark*. Govt's Opp'n at 18. The *Mezei* case "concerns an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries will not take him back." 345 U.S. at 207. The government would not disclose to the courts the evidence by which it considered the petitioner to be a threat to the public interest. *Id.* at 209. Nevertheless, the Supreme Court, in a 5-4 decision, deemed the petitioner's detention on Ellis

Island the equivalent of being stopped at the border. *Id.* at 215. It held that "times being what they are" (i.e., the Cold War), and "[w]hatever our individual estimate of [Congress's policy excluding certain aliens] and the fears on which it rests, [the petitioner's] right to enter the United States depends on congressional will, and the courts cannot substitute their judgment for the legislative mandate." *Id.* at 216.

The court disagrees with the government's assertion that the reasoning in *Mezei* governs the reasoning in this case. Govt's Opp'n at 18. The opening sentence of the *Mezei* decision indicates that the Court was not intending to tackle the constitutionality of indefinite detention. *Id.* at 207 (noting that the petitioner is stranded "in his *temporary* haven" (emphasis added)). To the extent the *Mezei* Court did make a determination as to indefinite detention, it has either been distinguished or ignored by subsequent courts. *Rosales-Garcia v. Holland*, 322 F.3d 386, 414 (6th Cir. 2003) (observing that the Court's conclusion in *Mezei* regarding indefinite detention has been undermined by post-*Mezei* cases that regard indefinite detention as raising constitutional concerns) (collecting cases). For example, the *Clark* Court did not bother distinguishing its holding from the holding in *Mezei*, and the *Zadvydas* Court explained that the cases differed in that the alien in *Mezei* was stopped at the border, seeking re-entry, whereas the alien in *Zadvydas* was already inside the United States. *Zadvydas*, 533 U.S. at 668-69.

Moreover, some very important distinctions exist between *Mezei* and this case. First, the *Mezei* Court was unaware of what evidence, if any, existed against the petitioner. *Mezei*, 345 U.S. at 209. And because the

Court accepted the government's unsupported allegations as true, the *Mezei* Court's determination regarding continued detention is categorically different from the determination facing this court. Here, pursuant to the Detainee Treatment Act[1] and *Boumediene*, the government presented evidence justifying its detention of the petitioners, but failed to meet its burden. *See generally Parhat*, 532 F.3d 834. Second, the *Mezei* petitioner, unlike the current petitioners, came voluntarily to the United States, seeking admission. *Mezei*, 345 U.S. at 208.

Drawing from the principles espoused in the *Clark* and *Zadvydas* cases and from the Executive's authority as Commander in Chief, the court concludes that the constitutional authority to "wind up" detentions during wartime ceases once (1) detention becomes effectively indefinite; (2) there is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and (3) an alternative legal justification has not been provided for continued detention. Once these elements are met, further detention is unconstitutional. The court addresses each element in turn.

First, in determining whether detention has become effectively indefinite, the court considers what efforts have been made to secure release for the petitioners and then uses that to evaluate the likelihood that these efforts (or any supplemental efforts) will be successful in the future. Looking back, the government cleared 10 of the petitioners for

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[1] This Act grants the Circuit exclusive jurisdiction to review CSRT decisions.

release by the end of 2003. Joint Status Report (Aug. 18, 2008), Ex. 1. The government cleared an additional 5 for release or transfer in 2005, 1 for transfer in 2006 and 1 for transfer in May of this year. *Id.* Throughout this period, the government has been engaged in "extensive diplomatic efforts" to resettle the petitioners.[2] Govt's Opp'n at 6. These efforts over the years have remained largely unchanged, and the government has not indicated that its strategy or efforts have been or will be altered now that the petitioners are no longer treated as enemy combatants. *See generally* Joint Status Report (Aug. 19, 2008), Ex. 1. Furthermore, the government cannot provide a date by which it anticipates releasing or transferring the petitioners. Joint Status Report (Aug. 19, 2008) at 4 (stating "there is not [sic] date for resettlement"). Accordingly, their detention has become effectively indefinite.

The second element has already been resolved by the Circuit's *Parhat* decision. The Circuit observed that "[i]t is undisputed that [the petitioner] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies," thus dispelling any concerns that the petitioners would return to the field of battle. *Id.* at 835. Finally, as to the last element, the government acknowledges that it no longer considers the petitioners to be enemy combatants. And it has only presented one alternative theory for detaining the

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[2] As indicated in the declaration provided by the Ambassador at Large for War Crimes, the government has unsuccessfully approached and re-approached almost 100 countries in its efforts to locate an appropriate resettlement location. Joint Status Report (Aug. 19, 2008), Ex. 1 ¶¶ 6-10.

petitioners: "wind-up" authority. Govt's Opp'n at 10. Therefore, this element, too, has been satisfied, and the court concludes that the government's detention of the petitioners is unlawful.

B. An Effective Remedy

The Supreme Court's most recent pronouncement regarding Guantanamo detainees assured them certain procedural guarantees, but hedged when discussing remedy. *Boumediene*, 128 S. Ct. at 2266 (qualifying that "release need not be the exclusive remedy and is not the appropriate remedy in every case in which the writ is granted"); *see also Hamdi*, 542 U.S. at 536-37 (concluding that "absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this *process*" – to "make his way to court with a challenge to the factual basis for his detention by his Government" (emphasis added)). To frame the issue, then, the court must begin with the historical underpinnings of the great writ and then turn to the scope of the political branches' authority over immigration matters.

1. The History of the Great Writ: Grounded in Liberty

As the Court in *Boumediene* recognized, "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Boumediene*, 128 S. Ct. at 2244 (recalling that "Magna Carta decreed that no man would be imprisoned contrary to the law of the land"). Historically, the writ has provided a critical check by ensuring that, as the drafters of Magna Carta put it,

"the king is and shall be below the law." *Id.* at 2245; *Loving v. United States*, 517 U.S. 748, 756 (1996) (noting that "[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny"). The *Boumediene* Court also recognized that "[l]iberty and security can be reconciled; and in our system they are reconciled with the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law." *Boumediene*, 128 S. Ct. at 2277.

The writ did just that; it "became an integral part of our common-law heritage by the time the Colonies achieved independence and received explicit recognition in the Constitution, which forbids suspension of '[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it.'" *Rasul v. Bush,* 542 U.S. 466, 473-74 (2005) (quoting U.S. CONST. art. I, § 9, cl. 2) (internal citation and quotation omitted). Courts have hailed it as a "great constitutional privilege," *Ex parte Bollman*, 4 Cranch 75, 95 (1807), and the English jurist Blackstone went even further in pronouncing it the "stable bulwark of our liberties," *Boumediene*, 128 S. Ct. at 2246. "[F]or centuries esteemed the best and only defence of personal freedom," *Ex parte Yerger*, 75 U.S. 85, 95 (1869), the writ is "designed to relieve an individual from oppressive confinement," *Carbo v. United States*, 364 U.S. 611, 618 (1961); *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 301 (2001) (noting that "[t]he historic purpose of the writ has been to relieve detention . . . ." (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953))); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (observing that the

traditional function of the writ has been "to secure release from illegal custody"). In that role, the writ has been used to "command the discharge of seamen who had a statutory exemption from impressment into the British Navy, to emancipate slaves, and to obtain the freedom of apprentices and asylum inmates." *St. Cyr*, 533 U.S. at 302.

2. The Authority to Admit Aliens: Historically a Political Inquiry

The U.S. Constitution grants Congress the authority "[t]o establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. The Supreme Court has "repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotations omitted) (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). This power is "necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security." *Galvan v. Press*, 347 U.S. 522, 530 (1954). And when the Executive acts to exclude an alien, there is no question of improper delegation of authority because this power is "inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). "[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo*, 430 U.S. at 792 (citing *Mezei*, 345 U.S. at 210). These powers, however, are not absolute: "the Government must respect the procedural safeguards

of due process," *Galvan*, 347 U.S. at 531, meaning "no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends," *Japanese Immigrant Case*, 189 U.S. 86, 101 (1903).

3. Separation of Powers Secures Personal Liberty

Under its broad constitutional authority, Congress has authorized the Secretary of Homeland Security to parole and/or admit aliens into the United States. 8 U.S.C. § 1252(a)(2)(B)(ii). It is undisputed that he has not acted on this authority with respect to the petitioners in this case. Govt's Opp'n at 14. Normally, the discussion would end here, and the court would have no reason to insinuate itself into a field normally dominated by the political branches. However, the circumstances now pending before the court are exceptional: the government captured the petitioners and transported them to a detention facility where they will remain indefinitely. The government has not charged these petitioners with a crime and has presented no reliable evidence that they would pose a threat to U.S. interests.[3] Moreover, the government has stymied its own efforts to resettle the petitioners by insisting (until recently) that they were enemy combatants, the same designation given to terrorists

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[3] The petitioners have proffered that individuals and organizations are prepared to support the Uighurs upon resettlement in the United States by providing housing, employment, money, education and other spiritual and social services. Petrs' Written Proffer (Oct. 7, 2008).

willing to detonate themselves amongst crowds of civilians.

The petitioners' request that the court order their release into the United States is not a simple one. It strikes at the heart of our constitutional structure, raising serious separation-of-powers concerns. The petitioners argue that the Circuit's *Parhat* decision resolved any separation of powers issues when it ordered the government to release a Uighur petitioner, well aware of the fact that release could only mean release into the United States. Petrs' Reply at 2. The government counters that the Circuit explicitly reserved judgment as to whether it even had the authority to release the petitioner under the DTA and notes that it filed a motion with the Circuit requesting clarification of its order. Govt's Opp'n at 7. The petitioners retort that the Circuit's denial of the government's request for clarification "resolved the question of whether it may order release pursuant to the [DTA]." Petrs' Notice of Supp. Auth. (Sept. 25, 2008) at 2.

As stated at the outset of its opinion in *Parhat*, the Circuit's focus was on assessing the validity of the final decision of a CSRT. *Parhat*, 532 F.3d at 835. The Circuit held that the evidence was insufficient to support the CSRT's determination and explicitly reserved judgment as to whether the DTA grants the Circuit authority to release detainees. *Id.* at 850 (noting that "we need not resolve today" whether the DTA grants release authority). And the Circuit noted in a recent order, expanding the *Parhat* decision to 4 other Uighur detainees, that "no issue regarding the places to which these petitioners may be released is before this panel." Petrs' Notice of Supp. Auth. (Sept.

25, 2008), Ex. A at 3. But, in the *Parhat* decision the Circuit also explicitly directs the government "to release or to transfer the petitioner, or to expeditiously hold a new CSRT consistent with this opinion," *Parhat*, 532 F.3d at 854, and declares that "there is no question but that the [district] court will have the power to order [Parhat] released," *id.* at 851. The precise extent of this court's authority to implement *Parhat's* mandate remains opaque. It is not for this court, however, to clarify the Circuit's intent or to read into the language reasoning and explanation that are simply not there. *See United States ex rel. Dep't of Labor v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997) (explaining that with respect to the mandate rule, "the mere fact that an issue could have been decided is not sufficient to foreclose the issue on remand" (internal alterations omitted) (quoting *Maggard v. O'Connell*, 703 F.3d 1284, 1289 (D.C. Cir. 1982))). Thus, the court does not consider the Circuit's *Parhat* decision to have conclusively resolved this court's authority to order the petitioners' release into the United States.

The government proposes that this court follow the holding reached by a fellow district judge in *Qassim*, 407 F. Supp. 2d 198. In assessing the weight to be accorded *Qassim*, the court notes that the legal landscape has changed since the decision was issued in 2005.[4] In June of this year, the Supreme Court handed

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[4] The government quibbles with this characterization, asserting that rather than changing the legal landscape, *Boumediene* affirms the holding in *Qassim* by making clear that "release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." Govt's Opp'n at 8-9 (quoting *Boumediene*, 128 S. Ct. at 2266). In support of the

down its *Boumediene* decision unequivocally extending to Guantanamo detainees the constitutional right to habeas corpus. *Boumediene*, 128 S. Ct. at 2229. And in the process, the Court re-emphasized the importance of the writ in preserving liberty. *Id.* at 2277. As the Court succinctly put it, "the writ must be effective." *Id.* at 2269. Additionally, this Circuit's decision in *Parhat* observed that "[i]t is undisputed that [a Uighur detainee] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies." *Parhat*, 532 F.3d at 835-36.

In addition to not having the benefit of these recent cases, the case law cited in *Qassim* is not entirely supportive of the absolute deference that the government suggests this court should afford the political branches. The *Qassim* court initially proffers a sound proposition: "a strong and consistent current runs through [immigration/alien exclusion cases] that respects and defers to the special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens." *Qassim*, 407 F. Supp. 2d at 203. But then the court extends this deference to circumstances including indefinite

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proposition that release is not appropriate in every case, the Supreme Court cites a case in which a retrial is ordered. *Boumediene*, 128 S. Ct. at 2267. The equivalent in this context would be an order to reconvene a CSRT; this in no way authorizes indefinite detention without just cause. Furthermore, to the extent *Boumediene* refers to prudential concerns cited in *Munaf v. Geren*, 128 S. Ct. 2207 (2008), issued the same day, those concerns are more appropriately addressed in this case under the separation-of-powers doctrine. The court discusses this doctrine in more detail below.

detention without just cause. Such absolute deference cannot bear the weight of precedent and reasonable constitutional construction. As the cases cited in *Qassim* recognize, "the power to exclude or expel aliens is vested in the political branches . . . except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene." *Fok Young Yo v. United States*, 185 U.S. 296, 302 (1902); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (same); *see also Fiallo*, 430 U.S. at 796 (explaining that "choices to exclude or expel aliens . . . are *frequently* of a character more appropriate to either the Legislature or the Executive than to the Judiciary" and that "the reasons that preclude review of political questions also dictate a *narrow standard of review* of decisions made by Congress or the President in the area of immigration and naturalization" (emphasis added)).

These qualifications are important – indeed essential – to preserving habeas corpus, "an indispensable mechanism for monitoring the separation of powers." *Boumediene*, 128 S. Ct. at 2259. The judicial authority to issue a writ of habeas corpus is derived from the guiding principle that "personal liberty [] is secured by adherence to separation of powers."[5] *Id.* at 2277. And the court's authority to safeguard an individual's liberty from unbridled

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[5] Although the judicial branch should give deference to the Executive's role in administering justice and enforcing the law, this deference does not mean that the third branch is frozen in place. When that deference awaits action contemplated by the Constitution and that action does not materialize, fidelity to the Constitution may require judicial intervention, especially when an individual's liberty is at stake.

executive fiat reaches its zenith when the Executive brings an individual involuntarily within the court's jurisdiction, detains that individual and then subverts diplomatic efforts to secure alternative channels for release. *See St. Cyr*, 533 U.S. at 301 (stating that the protections afforded by habeas review are at their strongest in reviewing the legality of executive detention). Liberty finds its liberator in the great writ, and the great writ, in turn, finds protection under the Constitution. *Wingo v. Wedding*, 41 8 U.S. 461, 468 (1974) (recognizing that "the 'great constitutional privilege' of habeas corpus has historically provided a prompt and efficacious remedy for whatever society deems to be intolerable restraints" (internal citation omitted)).

The political branches may not simply dispense with these protections, thereby limiting the scope of habeas review by asserting that they are using their "best efforts" to resettle the petitioners in another country. *Boumediene*, 128 S. Ct. at 2259 (concluding that the scope of habeas "must not be subject to manipulation by those whose power it is designed to restrain"). These efforts have failed for the last 4 years and have no foreseeable date by which they may succeed.[6] To accede to such manipulation would grant the political branches "the power to switch the Constitution on or off at will . . . ." *Id.* This "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Id.* Thus, the carte blanche authority the political branches purportedly wield over the Uighurs is not in

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[6] *See supra* note 1.

keeping with our system of governance. *See Hamdi*, 542 U.S. at 536 (holding that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake" (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989))). Because their detention has already crossed the constitutional threshold into infinitum and because our system of checks and balances is designed to preserve the fundamental right of liberty, the court grants the petitioners' motion for release into the United States. *See Wingo*, 418 U.S. at 468 (concluding that "if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release" (quoting *Fay v. Noia*, 372 U.S. 391, 401-02 (1963))).

IV. CONCLUSION

For the foregoing reasons the court grants the petitioners' motion for release into the United States and determines, therefore, that their motion for immediate release on parole pending resolution of their habeas petitions is moot. An Order consistent with this Memorandum Opinion is separately and contemporaneously issued this 8th day of October, 2008.

RICARDO M. URBINA
United States District Judge

Supreme Court, U.S.
FILED
JAN 19 2010
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No. 09-581

In the Supreme Court of the United States

JAMAL KIYEMBA, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a district court hearing a habeas corpus action may enjoin the Executive from releasing a detainee from military detention and sending him to a foreign country, where the Executive has submitted sworn declarations establishing that a detainee will neither be sent to any country where he likely will be tortured nor be detained at the behest of the United States.

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In the Supreme Court of the United States

No. 09-581

JAMAL KIYEMBA, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 561 F.3d 509. The order of the district court (Pet. App. 36a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2009. A petition for rehearing was denied on July 27, 2009 (Pet. App. 43a-46a). On October 22, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are members of the Uighur ethnic group in China. They previously were held in military detention as enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba. After petitioners filed for writs of habeas corpus, the government concluded that it would no longer seek to hold them as enemy combatants.

Petitioners do not want to return to China because they reasonably fear torture there. Consistent with established policy, the United States has committed not to return petitioners to China or to any country that would repatriate them to China or that would be likely to torture them. The government has engaged in sustained diplomatic efforts to locate appropriate alternate countries for resettlement. Of the 22 Uighurs originally at Guantanamo, five have been resettled in Albania, four in Bermuda, and six in Palau, where they live peacefully with no allegations of mistreatment. Two others have agreed to be resettled in Switzerland. The remaining five Uighurs at Guantanamo Bay have each previously received offers of resettlement from two different countries, including Palau.

In addition to filing petitions for writs of habeas corpus, petitioners sought an order from the district court requiring the government to provide 30 days' notice to the court and to them before transferring them from Guantanamo Bay. The district court granted petitioners a preliminary injunction requiring that the government provide such notice. The court of appeals reversed.

1. a. The situation involving the Uighurs arises in the broader context of military detention at Guantanamo Bay. In Executive Order No. 13,492, issued on January 22, 2009, 74 Fed. Reg. 4897 (E.O. 13,492), the President

determined that the "significant concerns" raised by the remaining detentions at Guantanamo Bay justified a focused effort to review the status of each person in military detention there. *Id.* § 2(b). Accordingly, the President directed Executive Branch officials to undertake "a prompt and thorough review" of each detainee in order to determine whether transfer, release, prosecution, or other disposition of the individual was consistent with the national security and foreign policy interests of the United States and the interests of justice. *Id.* preamble, §§ 1(c), 2(d), 3. And for those individuals whom the review determined should be returned home or resettled, the President instructed the Secretary of State to "expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate." *Id.* § 5. On May 15, 2009, the Secretary of State appointed a Special Envoy, Daniel Fried, to intensify diplomatic efforts to repatriate or resettle individuals cleared for transfer.

The President issued another Executive Order on January 22, 2009, that is significant in this case. See Executive Order No. 13,491, 74 Fed. Reg. at 4893. In that Executive Order, the President directed that "individuals detained in any armed conflict * * * shall in all circumstances be treated humanely and shall not be subjected to violence to life and person * * *, nor to outrages upon personal dignity." *Id.* § 3. The President further directed the formation of a "Special Task Force on Interrogation and Transfer Policies * * * to review interrogation and transfer policies." *Id.* § 5(a). As relevant here, the Task Force was instructed "to study and evaluate the practice of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and

policies of the United States and do not result in the transfer of persons to other nations to face torture." *Ibid.*

The Task Force made several recommendations aimed at clarifying and strengthening U.S. procedures for obtaining and evaluating assurances of humane treatment. See *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (Aug. 24, 2009) <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>. These included a recommendation that the State Department be involved in evaluating assurances in all cases and a recommendation that the Inspectors General of the Departments of State, Defense, and Homeland Security prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances. See *ibid.* The Task Force also made several recommendations for improving the United States' ability to monitor the treatment of individuals transferred to other countries, including a recommendation that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, to ensure consistent private access to the individual who has been transferred, with minimal advance notice to the detaining government. See *ibid.* The government is currently implementing Task Force recommendations.

b. For any transfer, a key concern of the United States is whether the foreign government will treat the detainee humanely and in a manner consistent with its international obligations. Prior to transfer of a detainee, the Executive (typically through the Department of State) assesses issues concerning humane treatment of the detainee in the country of proposed transfer. The

United States has provided sworn declarations to the courts below setting out the process utilized to make a determination of humane treatment prior to the transfer of a detainee. See Decl. of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues ¶¶ 3-9 (Mar. 8, 2005) (C.A. App. 99-107) (Prosper Decl.); Decl. of Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs ¶¶ 3-8 (June 2, 2005) (C.A. App. 108-112) (Waxman Decl.); Decl. of Sandra L. Hodgkinson, Deputy Assistant Secretary of Defense for Detainee Affairs ¶¶ 3-8 (July 9, 2008) (Hodgkinson Decl.) (Gov't Resp. to Pet. for Reh'g En Banc Exh. 1); Decl. of Clint Williamson, Ambassador-at-Large for War Crimes Issues ¶¶ 3-9 (July 7, 2008) (Gov't Resp. to Pet. for Reh'g En Banc Exh. 2) (Williamson Decl.). Each of those declarations explained that it is the longstanding policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured. Prosper Decl. ¶ 4; Waxman Decl. ¶ 6; Hodgkinson Decl. ¶ 6; Williamson Decl. ¶ 3. The government also has recently filed a declaration of Ambassador Fried in several cases involving transfers to reaffirm that policy and update the courts on the Executive's efforts concerning transfers and humane treatment. See Decl. of Daniel Fried ¶¶ 3-4, 6-8 (Nov. 25, 2009) (Fried Decl.).[1]

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[1] The Fried Declaration of November 25, 2009, was included in a sealed filing in several cases in order to prevent disclosure of the fact that the particular detainees involved in those cases had been approved by the Executive for transfer, when (unlike in this case) that information had not already been made public. A sealed letter filed contemporaneously with this brief in opposition identifies those cases. But the general information in the Fried Declaration about the government's

2. Petitioners are four Chinese nationals who are members of the Uighur ethnic group, a Turkic Muslim minority group in the far-western region of China. Pet. 5; Pet. App. 68a.[2] Prior to September 11, 2001, petitioners traveled to Afghanistan, where Uighur camps had been established in the Tora Bora mountains. *Id.* at 69a. After the onset of hostilities in Afghanistan, petitioners were captured by Pakistan or coalition forces, transferred to U.S. military custody, and brought to the Guantanamo Bay Naval Base for detention under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (50 U.S.C. 1541 note). Pet. App. 68a-69a; see *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2240-2241 (2008). In all, 22 Uighurs were brought there; four of them are petitioners here.

Habeas petitions were filed challenging the lawfulness of petitioners' detention. Pet. App. 69a. In 2008, the government determined that it would no longer seek to hold any of the remaining Uighur detainees at Guantanamo Bay as enemy combatants. *Ibid.*; see *id.* at 4a n.*.

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efforts to secure resettlement of detainees and assure humane treatment is not classified or itself confidential, when it is not associated with a particular detainee for whom the Executive's determination concerning transfer has not been made public. We have furnished petitioners with a copy of the Fried Declaration and will lodge a copy of the declaration with the Court upon request.

[2] Seventeen Uighur detainees originally filed habeas corpus petitions in the district court. Pet. App. 69a. Nine of those individuals were parties to this case before the court of appeals. *Id.* at 2a. Only four of them are petitioners before this Court. Pet. ii. (The other five individuals have been transferred from Guantanamo Bay. Pet. ii n.2.)

Petitioner Jamal Kiyemba, named in the petition as a next friend, is not a Uighur detainee.

3. When a person is released from military detention based on enemy status, the assumption is that he will be returned to his country of citizenship. China has repeatedly asked the United States to return the Uighurs. But petitioners have opposed return to China, because they reasonably fear "persecution, torture or death if repatriated to China." Pet. 5.

The United States assesses humane treatment concerns in determining destinations for detainees at Guantanamo Bay, and follows a policy of not repatriating or transferring a detainee to a country where he more likely than not would be tortured. See pp. 4-5, *supra*; see also *Munaf* v. *Geren*, 128 S. Ct. 2207, 2226 (2008). Accordingly, the United States has agreed not to return petitioners to China and not to transfer them to any other country that would repatriate them to China.

The United States has undertaken significant diplomatic efforts to resettle the Uighurs elsewhere. Those diplomatic efforts have been successful. All of the 22 Uighurs originally at Guantanamo Bay have now either been resettled or received offers of resettlement from other countries. The United States resettled five Uighurs to Albania in May 2006,[3] resettled four additional Uighur detainees in Bermuda in June 2009,[4] and resettled six Uighurs in Palau in October 2009.[5]

Seven Uighurs thus remain at Guantanamo Bay. On February 3, 2010, the government of Switzerland an-

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[3] See Notice of Transfer of Pet'rs at 1, *Mamet* v. *Bush*, No. 05-1886 (EGS) (D.D.C. May 5, 2006).

[4] Letter from Solicitor General to Clerk of this Court at 1 (June 11, 2009), *Kiyemba* v. *Obama*, No. 08-1234.

[5] *United States Transfers Six Uighur Detainees from Guantanamo Bay to Palau* (Oct. 31, 2009) <http://www.justice.gov/opa/pr/2009/October/09-ag-1179.html>.

nounced that it would accept two additional Uighurs for resettlement.[6] The remaining five Uighurs—four of whom are petitioners here—previously received an offer of resettlement in Palau, but did not accept it. All five also recently received an offer of resettlement from another country, but they did not accept that offer either, and it was withdrawn after several months. The United States continues its efforts to identify an additional appropriate country in which to resettle these five Uighurs.

4. Petitioners sought an order from the district court barring the government from transferring them from Guantanamo Bay without 30 days' prior notice to the court and to their counsel. Pet. App. 2a. The district court granted petitioners a preliminary injunction. *Id.* at 36a-39a; see *id.* at 40a-42a. It stated that a restriction on petitioners' transfer was necessary because "the government may remove the petitioners from [Guantanamo Bay] in the near future, thereby divesting * * * the court of jurisdiction" over petitioners' habeas petitions. *Id.* at 37a.

5. The government appealed, and the court of appeals initially directed that the case be dismissed for lack of subject-matter jurisdiction on the basis of Section 7(a) of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2636 (28 U.S.C. 2241(e)(2)). That Section provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been

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[6] See *Switzerland Admits Two Uyghurs for Humanitarian Reasons* (Feb. 3, 2010) <http://www.news.admin.ch/message/?lang=en&msg-id=31467>.

properly detained as an enemy combatant or is awaiting such determination." See Pet. App. 3a.

This Court subsequently held in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), that Section 7(a) of the MCA effected an unconstitutional suspension of the writ of habeas corpus as applied to detainees at Guantanamo Bay. *Id.* at 2274. The court of appeals therefore vacated its judgment of dismissal and reinstated the government's appeal of the district court's order. Pet. App. 3a-4a.

6. After reinstatement of the appeal, the court of appeals vacated the preliminary injunction. Pet. App. 1a-35a.

a. The court of appeals first held that the district court had jurisdiction to consider petitioners' request for injunctive relief. Pet. App. 4a-7a. The court rejected the argument that *Boumediene* involved only "core" habeas relief and left the MCA's preclusion of "ancillary" habeas jurisdiction intact. *Id.* at 4a-6a. The court also held that the second sentence of Section 7(a) of the MCA, which eliminates jurisdiction over "any other action against the United States or its agents relating to any aspect of the * * * transfer" of a detainee, was inapplicable here because "other action" referred to actions other than a petition for a writ of habeas corpus. *Id.* at 6a-7a (quoting 28 U.S.C. 2241(e)(2)).

On the merits, the court of appeals held that the district court had improperly issued a preliminary injunction. Pet. App. 14a. In reaching that conclusion, the court relied on this Court's recent decision in *Munaf*. In *Munaf*, the Court vacated an injunction barring the transfer to the Iraqi government for criminal prosecution of an American citizen who was detained in Iraq by the United States military. 128 S. Ct. at 2220. The peti-

tioners in *Munaf* sought an injunction prohibiting transfer because they alleged a fear of torture by the receiving government. *Id.* at 2214-2215, 2225. The Court rejected that claim, explaining that while torture "allegations are * * * a matter of serious concern, * * * in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. The Court noted the United States' statements that it would not transfer the petitioners it if believed that they would likely be tortured and that the State Department had determined that the Iraqi Justice Ministry (which would have authority over the petitioners) and its prison and detention facilities have generally met internationally accepted standards for basic prisoner needs. *Id.* at 2226. The Court held that judicial review of the Executive's determination respecting the likelihood of torture would be improper, observing that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Ibid.*

In this case, the court. of appeals concluded that "*Munaf* precludes a court from issuing a writ of habeas corpus to prevent a transfer on the grounds asserted by the petitioners here." Pet. App. 8a-9a. The court noted that "the record documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured," and shows that "the Government does everything in its power to determine whether a particular country is likely to torture a particular detainee." *Id.* at 9a. For that reason, the court observed, petitioners "are not liable to be cast abroad willy-nilly

without regard to their likely treatment in any country that will take them." *Ibid.*

The court of appeals further held that "*Munaf* * * * bars a court from issuing a writ of habeas corpus to shield a detainee from prosecution and detention by another sovereign according to its laws." Pet. App. 11a-12a; see *id.* at 13a-14a. That rule, the court explained, is rooted in "norms of international comity" as well as "separation of powers principles." *Id.* at 12a. The court noted that the requirement that the government provide pre-transfer notice "interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for detainees." *Ibid.* Any prosecution or detention that the petitioners would face after their transfer, the court explained, would be by the transferee government and not on behalf of the United States. See *id.* at 11a. The court observed that this case "does not involve" the transfer of detainees to a country where they would be subject to continued detention on behalf of the United States, because the Executive is no longer holding petitioners as enemy combatants and the Executive is diligently seeking their resettlement. *Id.* at 12a-13a n.*.

In light of *Munaf* and the government's "declared * * * policy not to transfer a detainee to a country that likely will torture him," the court of appeals concluded that petitioners' "claims do not state grounds for which habeas relief is available," and it therefore rejected their request for preliminary injunctive relief. Pet. App. 14a.

b. Judge Kavanaugh concurred. Pet. App. 14a-26a. He emphasized that "the Government has represented that no detainee in this case will be transferred to a country where the Government believes it likely the detainee would be tortured," just as the government had

represented with respect to the detainees in *Munaf*. *Id.* at 16a n.2. And he explained that here, as in *Munaf*, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally." *Id.* at 22a (quoting *Munaf*, 128 S. Ct. at 2226).

c. Judge Griffith concurred in part and dissented in part. Pet. App. 27a-35a. He acknowledged that the proposed injunction could "limit[] the government's flexibility in a sensitive matter of foreign policy." *Id.* at 27a. But he expressed concern that detainees could be detained on behalf of the United States after they were transferred. *Id.* at 29a. Judge Griffith acknowledged that "the government has submitted sworn declarations assuring the court that any transfer will result in release from U.S. authority." *Id.* at 31a. And he stated that "[i]f the government's representations are accurate," then "each transfer will be lawful." *Ibid.* But rather than defer to those sworn statements, *id.* at 32a, Judge Griffith would have upheld an injunction for the limited purpose of allowing petitioners "an opportunity to challenge the government's assurances that their transfers will not result in continued detention on behalf of the United States," *id.* at 35a.

6. Petitioners sought rehearing and rehearing en banc, which were denied. Pet. App. 43a-46a.

ARGUMENT

Petitioners contend (Pet. 13-14) that this Court should grant review to decide whether a habeas corpus court may require that the government provide 30 days' notice to the court and to counsel before transferring them from Guantanamo Bay. As an initial matter, any suggestion that the United States is contemplating send-

ing petitioners to a country where they likely would be tortured is refuted both by uncontradicted sworn declarations and by the government's extensive diplomatic efforts to resettle petitioners and the other Uighur detainees. Moreover, the court of appeals' decision is correct, does not conflict with any decision of this Court—but to the contrary follows from this Court's decision in *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008)—and does not conflict with any decision of another court of appeals. This Court's review therefore is not warranted.

1. As an initial matter, there is no basis for believing that petitioners likely would be tortured by any country that will receive them. That factual predicate for the injunction petitioners seek therefore is absent. As the President underscored in Executive Order No. 13,491, it is the policy of the United States not to transfer a detainee to a country where it is more likely than not that he will face torture, and the Executive works diligently to effectuate that policy with respect to each detainee. That is especially evident with respect to petitioners and the other Uighur detainees: the United States has committed not to return them to China, and it has made significant and successful diplomatic efforts to secure offers of resettlement for them in countries where it has determined—and petitioners do not dispute—that it is not likely that they would be tortured.

a. The United States has submitted a number of sworn declarations from Executive Branch officials describing the resettlement process. Each of the declarants has stated, in no uncertain terms, that it is the policy of the United States not to transfer a detainee to a country where the United States determines he more likely than not would be tortured.

Before the district court, the United States submitted declarations of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, and Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs. Ambassador Prosper's declaration provided an overview of the process utilized by the Executive Branch (primarily the Department of State) to arrange for transfers and to ensure that international obligations and United States policies are properly implemented during transfers. Prosper Decl. ¶¶ 1-9. Ambassador Prosper noted the "longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured," *id.* ¶ 4, and described the steps taken to ensure humane treatment by the receiving country for each transfer, *id.* ¶¶ 4-8. Ambassador Prosper also noted the sensitive diplomatic nature of that process, explaining that "[l]ater [court] review * * * of the Department[] [of State's] dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns." *Id.* ¶ 10. Mr. Waxman's declaration, which focused on transferring a detainee from United States control to the control of a foreign government, Waxman Decl. ¶ 1, confirmed that, with respect to such transfers, "it is the policy of the United States * * * not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured," *id.* ¶ 6.

Before the court of appeals, the United States provided updated declarations to confirm that the Execu-

tive Branch has procedures in place to effectuate the policy that the government will not transfer a detainee to a country where he more likely than not would be tortured. The declaration of Clint Williamson, Ambassador-at-Large for War Crimes Issues, again recounted the process utilized by the government to obtain assurances of humane treatment, Williamson Decl. ¶¶ 3-9, and the declaration of Sandra L. Hodgkinson, Deputy Secretary of Defense for Detainee Affairs, addressed the particular context of transfer to the custody of another sovereign, Hodgkinson Decl. ¶¶ 5-8. Both declarants again confirmed the "longstanding policy of the United States not to transfer a person to a country if it determines that it is more likely than not that the person will be tortured." Williamson Decl. ¶ 4; see Hodgkinson Decl. ¶ 6.

The declaration of Ambassador Daniel Fried (see p. 5 & note 1, *supra*), who was appointed as Special Envoy in May 2009 to intensify repatriation and resettlement efforts, updates the declarations provided to the courts below and reaffirms that it is the policy of the United States not to repatriate or transfer a detainee to a country where he more likely than not would be tortured. Fried Decl. ¶ 3. As Ambassador Fried explains, a key concern in any proposed transfer from the Guantanamo Bay detention facility is whether the receiving government will treat the detainee humanely and in a manner consistent with its international obligations. *Id.* ¶¶ 3-4. If transfer of a particular detainee is found to be appropriate, a process is undertaken, typically led by the Department of State, in which appropriate assurances concerning security and other matters are sought from the country to which the transfer of the detainee is proposed. *Id.* ¶ 6. In every transfer case in which deten-

tion or other security measures by the transferee government are foreseen, such assurances include assurances of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer. *Ibid.* Among other things, the Department of State considers whether the nation in question is a party to relevant treaties such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, and it ensures that assurances are tailored accordingly if the nation concerned is not a party or if other circumstances warrant. Fried Decl. ¶ 6.

Recommendations by the Department of State concerning proposed transfers "are decided at senior levels through a process involving Department officials most familiar with international legal standards and obligations and the conditions in the countries concerned." Fried Decl. ¶ 7. Thus, in determining whether it is more likely than not that an individual will be tortured in the proposed transfer country, the Department consults internally with its Bureau of Democracy, Human Rights, and Labor (which drafts the Department of State's annual Country Reports on Human Rights Practices) and the relevant Department of State regional bureau, country desk, or U.S. Embassy. *Ibid.* It also considers expressed commitments of officials of the foreign government. In evaluating assurances, Department of State officials consider the identity, position, or other information concerning the official relaying the assurances; political and legal developments in the relevant foreign country that provide context for the assurances; and the foreign government's incentives and capacity to fulfill its

assurances to the United States. *Id.* ¶ 8. In an appropriate case, the Department of State may consider various monitoring mechanisms for verifying that assurances are honored after transfer. *Ibid.*

If a case arises in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States will not transfer a detainee to the control of that government unless the concerns are satisfactorily resolved. Fried Decl. ¶ 8. Indeed, circumstances have arisen in the past in which the United States decided not to transfer detainees to their country of origin or to another country because of mistreatment concerns. *Ibid.*; see *id.* at ¶ 3.

b. Notably, petitioners do not contend that the United States plans to repatriate them to China or to transfer them to any nation where they likely would be tortured or would be detained on behalf of the United States. Indeed, they acknowledge that the Executive has stated since 2005 that it would not return them to China. Pet. 6 (citing Pet. App. 20a n.5); see Pet. 20. The numerous sworn declarations described above make plain the commitment of the United States not to transfer petitioners to any country where they more likely than not would be tortured. See Prosper Decl. ¶ 4; Waxman Decl. ¶ 6; Hodgkinson Decl. ¶ 6; Williamson Decl. ¶ 4; Fried Decl. ¶¶ 3-4.

The court of appeals recognized that commitment, explaining that sworn declarations "document[] the policy of the United States not to transfer a detainee to a country where he is likely to be tortured." Pet. App. 9a (citing *Munaf*, 128 S. Ct. at 2226). Indeed, the court explained, they establish that "the Government does everything in its power to determine whether a particu-

lar country is likely to torture a particular detainee." *Ibid.* And the court observed that the government's sworn declarations setting forth the firm policy against transfer to a country in which torture is likely provide the same assurance that this Court pointed to with respect to the petitioners in *Munaf*. *Ibid.*; see *id.* at 16a n.2 (Kavanaugh, J., concurring) (finding "no meaningful distinction" between the declarations here and in *Munaf*).

The court of appeals specifically noted petitioners' "failure to present anything that contradicts" the government's sworn declarations. Pet. App. 13a n.*. Petitioners do not provide such evidence or even assertions now. Instead, they note that the declarants have left their posts since the time the declarations were filed. Pet. 25 n.18. But that provides no basis to question the United States' longstanding policy. The policy statement articulated in the original declarations (by Ambassador Prosper and Mr. Waxman) was reaffirmed in subsequent declarations (by Ambassador Williamson and Ms. Hodgkinson) that were filed in all of the detainee cases—including these cases—and were appended to the government's response to petitioners' petition for rehearing before the court of appeals. And Ambassador Fried's declaration reiterates the Executive's firm commitment not to transfer detainees where the U.S. Government has determined that the transferee is more likely than not to be tortured.

The government's uncontradicted sworn statements are confirmed by its actions with respect to these very petitioners. The government has long committed not to return them to China and has pursued extensive diplomatic efforts to secure resettlement offers from other countries where Uighurs who have already been trans-

ferred now live peacefully and where there has been no claim that torture would occur.

Petitioners' failure to allege a fear of mistreatment abroad, combined with the government's specific efforts to find safe homes for these petitioners, and its long-standing policy not to transfer a detainee to a country where he more likely than not would be tortured makes plain that this Court's review is not warranted.

2. In addition, the court of appeals correctly held that this case "is controlled by the Supreme Court's recent decision in *Munaf*." Pet. App. 8a.

As an initial matter, *Munaf* held that "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'" 128 S. Ct. at 2219 (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006)). For that reason, it was "an abuse of discretion" for the district court in *Munaf* to grant a preliminary injunction "without even considering the merits of the underlying habeas petition." *Ibid.* The same is true here: the district court order granting petitioners preliminary injunctive relief included no consideration of petitioners' likelihood of success on the merits. See Pet. App. 36a-39a. To the contrary, the district court entered the injunction based solely on the possibility that a transfer could divest the court of jurisdiction, *id.* at 37a-38a—the same basis that this Court held insufficient in *Munaf*, see 128 S. Ct. at 2219. That fact alone warranted reversal of the district court's decision.

Moreover, the court of appeals correctly recognized that this Court's decision in *Munaf* "precludes the district court from barring the transfer of a Guantanamo detainee on the ground that he is likely to be tortured or subject to further prosecution or detention in the recipi-

ent country" where, as here, "[t]he Government has declared its policy" not to do so. Pet. App. 14a. In *Munaf*, this Court vacated an injunction barring the transfer of an American citizen detained in Iraq by the United States military to the Iraqi government for criminal prosecution. The petitioners in *Munaf*, like petitioners here, were in military detention. 128 S. Ct. 2214-2215. They, like petitioners, contended that an injunction prohibiting transfer was necessary because of the prospect of torture by the receiving government. *Id.* at 2225. In *Munaf*, as here, the government had declared its commitment not to transfer the petitioners in circumstances where torture was likely to result. *Id.* at 2226. This Court held that judicial review of that determination by the Executive respecting the likelihood of torture by the receiving country would be improper. The Court explained that while torture "allegations are * * * a matter of serious concern, * * * in the present context that concern is to be addressed by the political branches, not the judiciary." *Id.* at 2225. The Court observed that "[t]he Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 2226.

That judgment is appropriate, and never more so than with respect to petitioners and the other Uighurs. As Ambassador Fried has explained, the Department's "ability to seek and obtain assurances from a foreign government depends in part on the Department's ability to treat its dealings with foreign governments with discretion." Fried Decl. ¶ 9. The task of resettling detainees requires a "delicate diplomatic exchange" that "cannot occur effectively except in a confidential setting."

Id. ¶ 10. That has proven especially so with regard to the Uighurs because of their relationship with China and the potential difficulties that poses for other countries. It therefore is important for the Executive to have the latitude to manage resettlement efforts free of judicial second-guessing, because as Ambassador Fried explains, "[j]udicial review of the diplomatic dialogue between the U.S. Government and other governments concerning the terms of transfer, or of the ultimate decision to effect a transfer to a given country, risks undermining the ability of the U.S. Government to speak with one voice on Guantanamo transfer issues." *Id.* ¶ 12.[7]

3. Petitioners attempt to distinguish *Munaf* on several grounds, none of which has merit.

a. Petitioners suggest (Pet. 22-23) that the result here should be different from the result in *Munaf* because the petitioners in *Munaf* challenged their proposed transfer to a specific country (Iraq), while petitioners here do not know to which country they may be transferred. That factual distinction does not support a different result. The *Munaf* petitioners claimed that they would be tortured and possibly killed if transferred to the custody of the Iraqi government. Petitioners here seek a 30-day notice requirement in order to raise the same type of challenge. In *Munaf*, as here, the govern-

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[7] Petitioners' due process claim (Pet. 18-22) adds nothing to their argument. As the court of appeals recognized (Pet. App. 9a n.*), this Court held that courts may not second-guess a determination by the Executive that a detainee is not likely to be tortured in the proposed country of transfer. *Munaf*, 128 S. Ct. at 2225-2226. The hearing petitioners seek therefore could not provide them any relief. See *Estes* v. *Texas*, 381 U.S. 532, 542 (1965) (noting that "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice").

ment had documented its commitment not to transfer the petitioners to a country where torture is likely to result. While noting that allegations of torture were "a matter of serious concern," the *Munaf* Court concluded that "in the present context that concern is to be addressed by the political branches and not the judiciary." 128 S. Ct. at 2255. The Court reasoned that the Executive is "well situated" to determine "whether there is a serious prospect of torture" upon transfer "and what to do about it if there is," and that "the Judiciary is not suited to second-guess such determinations." *Id.* at 2225, 2226. That conclusion applies regardless of the proposed country of transfer.

b. Petitioners also suggest that the injunction here "merely provided notice, and did not enjoin any specific transfer contemplated by the Executive," Pet. 23, and therefore is less onerous than the injunctions in *Munaf*, which barred transfer of the detainees to Iraq. But the reason petitioners seek notice is so that they can litigate the Executive's determination that they would not be likely to face torture in the receiving country and, ultimately, to obtain an injunction barring transfer. Pet. 2, 13-14, 18-20, 22, 26. *Munaf* made clear that "[t]he Judiciary is not suited to second-guess" Executive Branch determinations about "whether there is a serious prospect of torture" upon transfer "and what to do about it if there is." 128 S. Ct. at 2226. And the United States has established, through numerous uncontested sworn statements, that a court-ordered notice requirement would in fact interfere with the Executive's resettlement efforts. Pet. App. 12a ("the requirement that the Government provide pre-transfer notice interferes with the Executive's ability to conduct the sensitive diplomatic negotiations required to arrange safe transfers for de-

tainees") (citing Prosper Decl. ¶ 10); see also Fried Decl. ¶¶ 9-12. Indeed, the injunction was more than a notice requirement; it forbade transfer before or within 30 days after notice. See Pet. App. 38a.

c. Petitioners also incorrectly suggest that the present case implicates two questions left open by *Munaf*. First, they note (Pet. 23) that the Court left open the question whether judicial inquiry would be proper in "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." *Munaf*, 128 S. Ct. at 2226. The court of appeals correctly recognized (Pet. App. 10a n.*) that that question is not implicated here. The Executive has not decided to transfer petitioners to a country where they more likely than not would be tortured; it has long determined to the contrary. *E.g.*, *id.* at 9a.

Second, petitioners suggest (Pet. 23-24) that the holding in *Munaf* is limited to its precise facts. As the court of appeals recognized, however, the rationale of *Munaf* is not so limited. Pet. App. 11a-12a. The petitioners in *Munaf*, like petitioners here, were detained by the military and sought to enjoin transfer because of a fear of torture, and this Court determined that "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." 128 S. Ct. at 2225. That holding is directly applicable here.

4. Contrary to petitioners' repeated suggestion (Pet. 13-22), this case does not raise any issue about whether a habeas corpus remedy is available to enjoin a detainee's transfer to another country when the receiving country would continue to detain the individual on behalf of the United States. As a factual matter, the government has represented that such transfers will not be

made, and petitioners have put forward no basis to dispute that representation. See Pet. App. 9a, 12a-13a n.*; see also Waxman Decl. ¶ 5 ("In all such cases of transfer for detention * * * the detainee is transferred entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States."). And in this case, petitioners are well aware that the United States intends to resettle them abroad—not to transfer them to the control of a foreign sovereign for detention—just as it already has resettled 15 of the 22 original Uighur detainees and obtained offers of such resettlement for the other seven.

As a legal matter, moreover, petitioners failed to preserve an argument regarding transfer that would result in continued detention. As Judge Kavanaugh explained, petitioners "did not advance that position in their 104 pages of briefing in [the court of appeals] (except perhaps an ambiguous reference at the tail end of one sentence in a supplemental brief)" and did not raise the argument at all "during two lengthy oral arguments in [that] [c]ourt." Pet. App. 23a (Kavanaugh, J., concurring). And because petitioners did not present the argument, the court of appeals did not pass on it. In any event, the injunction at issue here is far too broad to be justified on that ground, because it forbids any transfer without 30 days' notice, rather than only transfers in which the United States would effectively maintain custody of the detainee. *Id.* at 38a.[8]

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[8] Petitioners also suggest more generally (Pet. 16) that the district court injunction must be reinstated because "the Executive may not

5. Petitioners contend (Pet. 27-31) that review is warranted to address whether a party must demonstrate a likelihood of success on the merits to obtain relief under the All Writs Act, 28 U.S.C. 1651. They are mistaken.

The court of appeals correctly determined that, because petitioners sought a preliminary injunction to enjoin transfer, they must satisfy the four-part standard for that relief, including showing a likelihood of success on the merits. Pet. App. 7a-8a & n.*. The court addressed petitioners' All Writs Act argument in a footnote. *Id.* at 8a n.*. The court noted that it had previously held that, when a Guantanamo Bay detainee seeks a preliminary injunction to bar transfer, a district court should "balance the four factors in order to decide whether a preliminary injunction is 'necessary or appropriate'" within the meaning of 28 U.S.C. 1651. *Belbacha* v. *Bush*, 520 F.3d 452, 459 (D.C. Cir. 2008). Here, the court determined that petitioners were not "reliev[ed]

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unilaterally transfer a prisoner out of the jurisdiction." That suggestion presumes that the Executive would continue to detain petitioners subsequent to transfer. The Uighurs who have already been transferred have not been detained, and there is no suggestion in this case that the petitioners who remain at Guantanamo Bay would be detained in a country of transfer. Moreover, as the government has explained, any post-transfer detention of persons at Guantanamo Bay "would be effected 'by the foreign government pursuant to its laws and not on behalf of the United States.'" Pet. App. 11a (quoting Waxman Decl. ¶ 5). In any event, petitioners' suggestion is inconsistent with *Munaf*, in which this Court held that there was habeas corpus jurisdiction, but ruled that the district court could not review the Executive's determination regarding a detainee's post-transfer treatment, and in which the Court vacated the injunction that purported to maintain the status quo pending such a judicial inquiry. The decisions upon which petitioners rely (Pet. 14) significantly pre-date *Munaf*, and none of them stands for the sweeping propositions suggested by petitioners.

* * * of the need to satisfy the standard for a preliminary injunction" simply because they invoked the All Writs Act when the relief they sought was a preliminary injunction. Pet. App. 8a.

That is the same conclusion this Court reached in *Munaf*. The *Munaf* petitioners invoked the All Writs Act, Habeas Pets. Br. at 45-46, *Munaf*, *supra* (Nos. 07-394 & 06-1666), and this Court nonetheless held that the district courts erred in enjoining transfer "without even considering the merits of the underlying habeas petition," 128 S. Ct. at 2219. To the extent petitioners suggest that they were entitled to an injunction merely upon showing that the district court had jurisdiction, Pet. 27, that suggestion is squarely at odds with *Munaf*, where the district court had jurisdiction, the proposed transfers would have terminated district court jurisdiction, and yet this Court held that injunctions against those transfers were improper. *Munaf*, 128 S. Ct. at 2219. And here, as in *Munaf*, the serious separation-of-powers concerns raised by judicial second-guessing of Executive Branch determinations regarding the likelihood of torture makes a preliminary injunction inappropriate under the All Writs Act.

Petitioners erroneously contend that the decision below conflicts with *Klay* v. *United Healthgroup, Inc.*, 376 F.3d 1092 (11th Cir. 2004). In *Klay*, the court of appeals remarked (in the context of an injunction to stop arbitration of doctors' claims against a health maintenance organization) that "[t]he requirements for a traditional injunction do not apply to injunctions under the All Writs Act." *Id.* at 1100. As the Eleventh Circuit later explained, that statement is dictum, because "the *Klay* Court struck down the challenged injunctions on the ground that they were not needed to protect the dis-

trict court's jurisdiction," and the decision "in no way turned on the applicability of the traditional preliminary injunction requirements to injunctions issued pursuant to the All Writs Act." *Alabama* v. *United States Army Corps of Eng'rs*, 424 F.3d 1117, 1131-1132 n.20 (2005), cert. denied, 547 U.S. 1192 (2006). In addition, the court observed in *Alabama* that even if the statement in *Klay* "were a holding rather than dictum, there would be some doubts as to [its] validity," because, as the *Klay* court itself recognized, the Eleventh Circuit's cases are "deeply inconsistent on this issue." *Id.* at 1132 n.20 (citing *Klay*, 376 F.3d at 1100 n.12).

In any event, the court below did not purport to hold that likelihood of success on the merits is always required under the All Writs Act; instead, it limited its brief analysis to the situation of a Guantanamo Bay detainee's request for an injunction to enjoin transfer. Pet. App. 8a n.*. And even if the Eleventh Circuit has different standards for some relief under the All Writs Act, that difference would not be implicated here because the Eleventh Circuit would not apply the All Writs Act standard to this case. See *Schiavo* v. *Schiavo*, 403 F.3d 1223, 1229 (11th Cir. 2005) ("[W]here the relief sought is in essence a preliminary injunction, the All Writs Act is not available.").

The decision below likewise does not conflict with *In re Johns-Manville Corp.*, 27 F.3d 48 (2d Cir. 1994), a three-paragraph opinion addressing a series of stays entered by a district court to stop payments from a trust while litigation to restructure the trust was ongoing, *id.* at 49. In that case, unlike this one, a party was seeking to "maintain the status quo" through a stay, *ibid.*, not to obtain preliminary injunctive relief. The Second Circuit did not hold that a showing of likelihood of suc-

cess on the merits may never be required for relief under the All Writs Act; it simply held that no such showing was required to support the stays entered in that case. *Ibid.* There is therefore no disagreement in the circuits warranting this Court's review.

6. Petitioners suggest (Pet. 31-32) that this petition should be held pending the outcome of *Kiyemba* v. *Obama*, cert. granted, No. 08-1234 (Oct. 20, 2009) *(Kiyemba I)*. But, as petitioners readily admit, *Kiyemba I* poses an entirely "separate question" from the notice issue here. Pet. 3; see, *e.g.*, *ibid.* ("[T]he issues presented by this petition are distinct."); Pet. 31 ("the two petitions" are "fundamentally different"). *Kiyemba I* presents the question whether the federal courts, exercising habeas corpus jurisdiction, may properly order the United States government to bring petitioners into the United States for release, in contravention of the federal immigration laws and specific statutory bars. The answer to that question would have no effect on the question here, which concerns the district court's authority to prevent the government from resettling petitioners in a foreign country. Accordingly, the petition should not be held pending the outcome of *Kiyemba I*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,
Petitioners,

v.

BARACK OBAMA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY

1. In its Brief for the Respondents in Opposition ("Opp."), the Government does not contest that the issues presented by the Petition are both exceptionally important and recurring in a significant number of Guantánamo detainee cases.[1] In fact, after the Petition was filed, Justices Thomas and Scalia cited this case in particular as raising issues worthy of this Court's review in dissenting from a denial of certiorari. *See Noriega v. Pastrana*, No. 09-35, 2010 LEXIS 826, at *2 (U.S. Jan. 25, 2010) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (certiorari should have been granted since the Court "would provide much-needed guidance on two important issues with which the political branches and federal courts have struggled since we decided *Boumediene*") (citing, *inter alia*, *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (*Kiyemba II*)).

The Executive's aim to close the Guantánamo facility has brought issues related to transfer to the forefront of detainee habeas litigation. Indeed, the Notice Orders at issue in the Petition are also at issue in more than one hundred detainee cases. The lower courts, which have jurisdiction over the detainees in question, need guidance from this Court as to the reach of *Boumediene* and *Munaf* with respect to the materiality of particular facts and circumstances of particularized transfers, and the appropriate level of deference to Executive policy in this area. *See F.T.C.*

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[1] Unless otherwise noted, all capitalized terms have the same meanings assigned to them in the Petition for Writ of Certiorari, dated November 10, 2009 ("Pet.").

v. Jantzen, 386 U.S. 228, 229 (1967) (certiorari granted, in part, "[i]n view of the pendency of almost 400 such orders" as the challenged orders); *United States v. Powell*, 330 U.S. 238, 240 (1947) ("The cases are here on petitions for certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government."); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 302 n.2 (1947) (noting that certiorari was granted, in part, based on the petitioners' representation that approximately 450 claims raising the same question had been made).

2. In its opposition brief, the Government argues the merits of the Notice Orders principally by describing its specific efforts to relocate these Uighur Petitioners to safe third countries and reiterating its policy commitment not to return Petitioners to China, where it concedes they would be tortured. As an initial matter, the fact that the Government has not been impeded from making these relocation efforts itself demonstrates the lack of any harm to the Government from the Notice Orders. During the pendency of the certiorari petition in *Kiyemba v. Obama,* No. 08-1234 ("*Kiyemba I*"), ten Uighur detainees were transferred to Bermuda and Palau, in each case after notice to the detainees. In addition, the *Kiyemba II* Petitioners received advance notice of the proposed transfers described in the Government's brief. There is likewise no merit to the Government's claim that the Notice Orders would result in the disclosure of sensitive diplomatic discussion, since any proposed transfer can be filed under seal, by court order or agreement (in any event, all of the efforts described by the Government with respect to the Uighurs is now in the public

domain, which the Government does not claim impeded its efforts).

Fundamentally, the Government's focus on its relocation efforts for the Uighurs side-steps Petitioners' legal claim to notice of an imminent transfer, and ignores the fact that identical 30-day Notice Orders have been entered in cases involving over one hundred other detainees for whom the Uighur relocation efforts, and the Government's pronouncements, are inapplicable.

The Government notes repeatedly in its brief that its position that it will not return the Uighur Petitioners to China is a matter of policy or "commitment." *See* Opp. 2, 5, 7, 13, 18, 19, 20. However, the Government does not dispute that such policies and commitments are political in nature, and can be changed at the Executive's discretion. Like the Government's previous statements, the policy positions stated in the "new" Declaration of Daniel Fried submitted with the Government's brief, *see* Opp. at 5 n.1, are subject to unilateral reversal by the Executive. Indeed, the belated submission of the Fried Declaration illustrates the unpredictability of government policy: if the policy must be restated while a case is under consideration here, it affords no basis to reject out of hand the district court's conclusion that the court and Petitioners should be provided with notice of the Government's intent to effect an actual transfer.

The Government would leave all matters of transfer to the Executive Branch, even in cases involving non-enemy, non-combatant petitioners within a district court's jurisdiction. But this Court

has held that the Executive is not entitled to a "blank check" in the realm of detentions. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.").

3. Petitioners argue that they are "entitled to notice and an opportunity to obtain judicial review of claims relating to their proposed transfer, if necessary, once the circumstances of the proposed transfer are known." Pet. at 26. Even accepting the Government's claims with respect to the Uighurs at face value, the Government intends to relocate many other detainees to their home countries *despite* their well-founded fears of torture or continued detention upon return. As Respondent explains, "[w]hen a person is released from military detention based on enemy status, the assumption is that he will be returned to his country of citizenship." Opp. at 7. For many detainees—not only the Uighurs—the "country of citizenship" is a location where the individuals fear they will likely be tortured or subject to further detention. The Court's guidance on the validity of Petitioners' claims is necessary in part because there are other cases affected by *Kiyemba II*. If the Court declines to hear Petitioners' claims, permitting the Government to transfer detainees without notice in this and other cases, the Government may evade review of its policy altogether.

As explained in the *amicus* brief filed by various Guantánamo detainees, several district court judges issued Notice Orders (or their equivalent) to create a

mechanism to ensure that a detainee's counsel would have an opportunity to forestall the detainee's transfer to his home country where the detainee had reason to fear that he would be tortured or subject to continued detention. *See* Br. of Guantánamo Detainees, Umar Hamzayevich Abdulayev And Other Guantánamo Detainees, As *Amici Curiae* In Support Of Petitioners at 5, dated Dec. 15, 2009 ("Amicus"). The Court of Appeals' decision places many of these detainees at risk, a risk not mitigated by the Government's express desire not to transfer Uighurs to China. Indeed, the situation of many of these detainees highlights the need for these Notice Orders and the recurring significance of the questions presented by the Petition. We respectfully refer the Court to the Amicus, which describes in further detail other cases where the 30-day Notice Orders or other orders affected by *Kiyemba II* are necessitated based on a current fear that the Government will transfer habeas petitioners to a country where they are more likely than not to be tortured or unlawfully detained.

The D.C. Circuit's conclusion that *Munaf* supports the decision below is an odd one, for the *Munaf* petitioners had the very thing Petitioners seek to preserve here: *notice* of the intended transfer. The Court there did precisely what we submit would happen here: it reviewed the facts and circumstances of the proposed transfer, and considered whether anything in law precluded transfer. Finding that transfer was planned to a sovereign ally for prosecution of crimes allegedly committed within that sovereign's territory, this Court found no basis in habeas to enjoin the transfer. Other cases, involving other sovereigns, and other facts, may—or may not—lead to other answers.

4. The Government concedes that Petitioners preserved the argument that they are entitled to the Notice Orders based on the claim that they will potentially be tortured after a transfer out of Guantánamo, but asserts that Petitioners failed to preserve the argument that the Notice Orders are also necessary to prevent transfer for continued detention. Opp. at 24. However, Petitioners squarely raised both claims below. *See, e .g.*, Suppl. Br. for Appellees, at 5, *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. Aug. 21, 2008) ("Appellees Suppl. Br.") (petitioners arguing for habeas claims against transfer that would result in "their continued unlawful detention in a location beyond the jurisdiction of the district court . . . *at the hands of, in coordination with, or at the behest of the United States*") (emphasis added); *see also id.* ("Petitioners assert further that any proposed transfer that would unlawfully subject them to risk of physical harm or *continued unlawful detention* would be patently illegal and clearly within the purview of the district court to prevent.") (emphasis added); Suppl. Response Br. for Appellees at 8, *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. Sept. 4, 2008) ("Appellees' Suppl. Response Br.") ("claims opposing unlawful transfer—whether designed to unilaterally defeat the court's habeas jurisdiction or *to result in continued unlawful detention* or physical harm to the petitioner—sound in habeas") (emphasis added); *id.* ("Any inconvenience purportedly suffered by Respondents by providing notice of transfer is outweighed by the harm Petitioners would suffer if unilaterally transferred to a foreign country *for unlawful detention* or torture.") (emphasis added).

Like the prior policy statements by the Government, the Fried Declaration conspicuously does

not commit to even a general policy to not transfer Petitioners and other detainees for further detention. *See, e.g.*, Fried Decl. ¶ 3 (stating policy that "U.S. government will not transfer individuals to countries where it has determined that they are more likely than not to be *tortured*," but not mentioning transfer for continued detention) (emphasis added).[2] As Petitioners previously submitted, and as Judge Griffith concluded, Petitioners are entitled to notice and an opportunity to be heard on a claim that a proposed transfer would actually result in "their continued unlawful detention in a location beyond the jurisdiction of the district court, whether at the hands of a foreign government or at the hands of, in coordination with, or at the behest of the United States." *See, e .g.*, Appellees' Suppl. Br. at 5; App. 32a (Griffith, J., dissenting and concurring) ("When an individual entitled to habeas protections faces the prospect of continued detention—be it by the United States at Guantanamo Bay or on its behalf after transfer to a foreign nation—he must be afforded some opportunity to challenge the government's case.").

Asserting that this argument was not preserved, the Government seizes on Judge Kavanaugh's concurrence below, which stated that Petitioners' claim with respect to transfer for further detention "at the behest of the United States" was only an "ambiguous" reference to a claim against "continued

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[2] In addition, Petitioners respectfully refer the Court to additional documents that are being submitted herewith under separate cover letter. *See* Letter of Melissa J. Durkee, dated February 25, 2010. Because the Government asserts that these documents contain certain classified information, they are being submitted under seal.

detention 'on behalf of the United States.'" App. 23a. This assertion is inconsistent with the record. *See, e.g.*, Appellees' Suppl. Br. at 5 (emphasis added); Appellees' Suppl. Response Br. at 8; *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) ("That petitioner limited its contract argument to a few pages of its appellate brief does not suggest a waiver . . . ."). In any event, Judge Griffith's concurrence and dissent recognized that Petitioners raised this claim and were entitled to the Notice Orders based upon it, App. 29a-35a, which is more than sufficient basis for this Court to review the argument. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 122 (2001) (Scalia, J., concurring) ("[T]he Court of Appeals apparently decided that the particular . . . challenge brought by petitioners had been preserved, because it addressed the argument on the merits.").

Moreover, despite the Court's general (though not absolute) rule disfavoring the consideration of new *issues* on appeal, there is no limitation on the consideration of a new *argument*. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Whether the Notice Orders are justified by the need to protect against transfer to torture—which is indisputably preserved—or transfer to continued detention is a difference of arguments, not issues. The relief requested and the question presented is the same, and in each case raises the fundamental point of whether the district court having jurisdiction should have some opportunity to consider whether the particularized facts of the case raise a basis to question the transfer of a petitioner out of the Court's jurisdiction. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (holding that Court may consider

"pure issue of law" even though not raised below); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (same).

5. The Government argues that *Munaf* has settled the question whether an All Writs Act injunction requires satisfaction of the four-part standard for traditional preliminary injunctions. Opp. at 26. *Munaf* does not mention the All Writs Act at all—let alone discuss its application. The argument that this Court settled the question of the Act's applicability without mentioning the Act itself is, to the say the least, implausible. "Questions which merely lurk in the record . . . are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The Government does not dispute that the D.C. Circuit's decision below, equating an All Writs Act injunction with a Rule 65 injunction, conflicts with *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (11th Cir. 2004). Instead, it cites *Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117, 1131-32 n.20 (11th Cir. 2005), to contend that there is a split within the Eleventh Circuit on the issue. This only demonstrates the need for this Court to resolve an All Writs Act issue that is already subject to a well-developed circuit split. *See Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 710 n.5 (2003) (certiorari granted to address question on which the Ninth Circuit "expressed divergent views"); *Comm'r v. Estate of Bosch*, 387 U.S. 456, 457 (1967). Moreover, the Government offers no grounds to reconcile the D.C. Circuit's decision here with *In re Johns-Manville Corp.*, 27 F.3d 48 (2d Cir. 1994), other than to say that the Second Circuit's decision should be limited to its facts. Opp. at 27-28. The critical point is that the

Second Circuit ruled *as a matter of law* that the movant need not meet the traditional Rule 65 factors in obtaining an All Writs Act injunction, which is directly at odds with the D.C. Circuit's decision here. This Court should grant certiorari here to harmonize the law of the lower courts.

6. For the reasons explained, the questions here are undoubtedly worthy of immediate review. Moreover, *Kiyemba II* affords the Court the opportunity to address certain important questions that would otherwise have been addressed in the recently remanded *Kiyemba I*, and which remain both exceptionally important and recurring in a significant number of Guantánamo detainee cases. *See* No. 08-1234, Slip Op. dated March 1, 2010 ("Slip Op."). For example, in *Kiyemba I*, Petitioners asserted, following the rationale of extra-territorial application of the Constitution set out in *Boumediene*, that the Due Process Clause of the Fifth Amendment runs to Guantánamo and affords them a release remedy.[3] Petitioners also assert in this case that habeas courts have the authority under the Due Process Clause to provide Petitioners with notice and a hearing, so that they may raise any legitimate concerns they may have with a proposed transfer before it is a *fait accompli*. *Kiyemba I* was remanded because of the factual development that the petitioners had recently been offered resettlement in countries other than the United States. Slip Op. at 1. While that factual

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[3] The Brief for the Respondents in *Kiyemba I* (at 42-44) did not contest that the Due Process Clause is in effect at Guantánamo (although the Government contended that it did not afford the relief sought there).

development is also common to Petitioners here, it does not impact the questions presented in the petition, which relate to the judicial *habeas* authority to require 30-days' notice prior to any intended transfer.

Alternatively, if the Court believes that recent factual developments such as the resettlement offers or the Government's recent submission of the Fried Declaration are relevant to the questions presented, Petitioners respectfully submit that the Court of Appeals' decision should, consistent with this Court's recent ruling in *Kiyemba I*, be vacated and remanded to determine whether further proceedings in the district courts are necessary and appropriate for disposition of this case. *See* Slip Op. at 1-2.

CONCLUSION

For the foregoing reasons, and those previously submitted, the Court should grant the petition for a writ of certiorari or, alternatively, vacate the Court of Appeals' decision and remand to determine whether further proceedings in the district courts are necessary and appropriate.

Respectfully submitted,

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In The Supreme Court of the United States

JAMAL KIYEMBA, et al.,
Petitioners,

v.

BARACK OBAMA, PRESIDENT
OF THE UNITED STATES, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF GUANTANAMO DETAINEES, UMAR HAMZAYEVICH ABDULAYEV AND OTHER GUANTÁNAMO DETAINEES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI*[1]

Amici Curiae Umar Hamzayevich Abdulayev, Ravil Mingazov, Ahmed Belbacha, Abdul Aziz Naji, Maasoum Abdah Mouhammad, Abdul Hadi Omer Mahmoud Faraj, Abu Abdul Rauf Zalita, Abdul Hamid Al-Ghizzawi, Rafiq Bin Bashir Bin Jallul Alhami and Mohammed Abdul Rahman are all individuals detained by the United States government in Guantánamo Bay. They are nationals of Tajikstan, Russia, Algeria, Libya, Syria and Tunisia – countries with notorious human rights records, including recognized practices of torture and abuse. Some *amici* are nationals of countries in which previously transferred detainees were in fact tortured and abused.

Some *amici* have been cleared by the Government for transfer from Guantánamo to their home country. Each *amici* has obtained from the district court an order requiring the Government to provide thirty days notice in advance of transfer, similar to the order obtained by Petitioners ("Thirty Day Notice Order"), giving *amici* an opportunity to raise factual or legal objections to a proposed transfer, and at least two of them (Abdulayev and Alhami) have ob-

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1 The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

tained a preliminary injunction barring transfer to his home country after such notice was given.

Amici are greatly concerned that the lower court's decision, if not reversed by this Court, would lead to *vacatur* of those Orders and subject *amici*, and other similarly situated Guantánamo detainees, to a grave risk of torture. *Amici* wish to highlight the various fact-specific circumstances that cause each to fear torture upon return to their home countries,[2] and to emphasize that the Executive's blanket "policy" purportedly restricting transfers to countries posing a risk of torture, absent individualized judicial review, will continue to prove insufficient to protect *amici* from grave harm.

SUMMARY OF ARGUMENT

The Court of Appeals' decision endorses a position consistently advocated by the Executive – yet repeatedly rejected by this Court – that Executive decisions regarding detention operations should be immune from judicial review so long as these decisions implicate an area of Executive prerogative or expertise. Specifically, the Court of Appeals unhesitatingly accedes to the "government's assessment" of the likelihood that a petitioner might face torture abroad, based only upon a government official's four-

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[2] Some *amici* have confidential information that they have presented to the district courts under seal regarding their particularized fear of torture, but wish not to share as part of a public filing with this Court.

year old declaration proclaiming the Executive's good faith efforts to avoid subjecting a petitioner to torture. *Kiyemba v. Obama*, 561 F.3d 509, 514, 516 (D.C. Cir. 2009). Yet the central, unifying lesson of this Court's so-called "enemy combatant cases" is that, under fundamental separation-of-powers principles, neither war nor the Executive's foreign relations power provides the Executive a "blank check" to act in areas that affect individual rights. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion); *Hamdan v. Rumsfeld*, 548 U.S. 556, 636 (2006) (Breyer, J, concurring); *see also Rasul v. Bush*, 542 U.S. 466 (2004). Because, as the Court of Appeals recognized, challenges to Executive transfer are a core guarantee of habeas corpus, detainees must have an opportunity to individually challenge the factual basis of the Executive's judgment about the legality of a proposed transfer. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

The Court of Appeals also transformed this Court's narrow, fact-specific holding in *Munaf v. Geren*, 128 S. Ct. 2207 (2008), proscribing a court's interference with a foreign ally's territorial sovereignty, into a blanket jurisdictional prohibition on judicial review of core habeas challenges to transfer. Such a reading cannot be squared either with the fundamental separation-of-powers principles articulated in *Hamdi*, *Hamdan* and *Boumediene* or with the peculiar circumstances that governed *Munaf* itself. Indeed, contrary to the Court of Appeals' central premise, courts every day evaluate Executive assessments regarding likelihood of torture, fully consistent with separation-of-powers principles.

Amici each face a risk, in some cases imminent, of transfer to repressive countries with deplorable human rights records. Unlike the *Munaf* petitioners, *amici* do not ask a U.S. court to review a foreign judgment or thwart an ally's police operations within its territory. Instead, *amici* merely seek notice and an opportunity to present particularized facts regarding the risk of torture that awaits them should they be returned to their country of citizenship – relief that a district court is fully competent to provide. The Court should grant *certiorari* to review the Court of Appeals' sweeping disregard of this Court's prior rulings and to ensure that Executive fiat does not replace the Great Writ's role as "an indispensible mechanism for monitoring separation of powers." *Boumediene*, 128 S. Ct. at 2259.

ARGUMENT

I. *AMICI*, LIKE NUMEROUS OTHER GUANTÁNAMO DETAINEES, FACE A SERIOUS RISK OF TORTURE OR DISAPPEARANCE IF TRANSFERRED TO THEIR VARIOUS COUNTRIES OF CITIZENSHIP.

According to a recent Department of Defense ("DoD") announcement, 116 Guantánamo detainees have been cleared for release – an administrative designation signifying that President Obama's Guantánamo Review Task Force no longer wishes to imprison a detainee, and has begun the process of

transferring him to his country of citizenship or to a third country.[3] Of that number, there remain at least seven Chinese nationals (Uighurs), seven Tunisians, seven Algerians, two Syrians, three Libyans and one Tajik.[4] Thus, *amici* and a great number of other Guantánamo detainees have a real, and in some cases imminent, concern of being transferred to countries with notorious human rights records and where *amici* themselves face serious risks of torture and abuse. In some cases, the risk of torture exists solely because of U.S. government conduct. By transporting detainees from their adopted homes in Afghanistan and Pakistan and labeling them "enemy combatants," the U.S. created a risk of torture for detainees in countries they departed long ago.

Amici have in place Thirty Day Notice Orders similar to those obtained by Petitioners (or, in the case of Abdulayev and Alhami, preliminary injunctions barring transfer to their home countries). These Notice Orders are a vitally important mechanism to ensure that, if they have a principled objection to transfer, *amici* will be afforded an opportunity to put particular facts before the district court that might rebut the Executive's unilateral assess-

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[3] *See More Than Half Guantanamo Inmates Can be Transferred: US*, AGENCE FRANCE-PRESSE, Dec. 3, 2009 (quoting Secretary Gates' Senate testimony), http://www.google.com/hostednews/afp/article/ALeqM5hPHEYKHwDT-QmK97ap1iOdHNuQ1g.

[4] Carol Rosenberg, *78 Guantánamo Detainees Cleared to Leave*, MIAMI HERALD, Sept. 28, 2009.

ment that no such risk exists and to ensure the Executive is acting pursuant to applicable constraints imposed by Due Process and the *non-réfoulement* provisions of the Convention Against Torture ("CAT"). *Amici*'s cases underscore the need for an individualized determination of the risks of transfer for each detainee.

Umar Hamzayevich Abdulayev

Amicus Umar Hamzayevich Abdulayev is a Tajikistan national who has been cleared by the Guantánamo Review Task Force for transfer to Tajikstan. He reasonably fears torture and his murder if he is repatriated there.

Mr. Abdulayev fled Tajkistan with his parents and siblings in 1992 during the Tajik civil war, when he was thirteen, and has never returned. Around November 25, 2001, Pakistani police officers arrested Mr. Abdulayev at a market in a Pakistani refugee camp where Mr. Abdulayev lived with his mother and siblings. He was eventually transferred to Guantánamo. While at Guantánamo, Tajik government officials repeatedly threatened Mr. Abdulayev during three interrogation trips. The Tajik officials pressured Mr. Abdulayev to work for them as a spy in Afghanistan, where he had lived for a time after fleeing Tajikistan.[5] Angered by Mr. Abdu-

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[5] Petitioner Abdulayev's Opposition to Respondents' Motion for a Stay of Proceedings, *Jabbarov. v. Bush*, Civ. A. No. 05-2386, (D.D.C. June 8, 2009), Exhibit C, ¶ 23.

layev's refusals to cooperate, the Tajik officials specifically threatened to imprison, torture and even "get rid of" him.[6]

The Tajik officials' specific threats of torture against Mr. Abdulayev are especially concerning in light of that government's recognized history of human rights abuses. The U.S. State Department's Country Report finds Tajik security officials frequently employ torture and abuse, including "systematic beatings, sexual abuse, and electric shock to extort confessions during interrogations."[7] Amnesty International has observed that "[w]idespread and routine torture or other ill-treatment by law enforcement officers continue to be reported."[8] Similarly, Human Rights Watch reports that "[e]xperts agree that in most cases there is impunity for rampant torture in Tajikistan."[9]

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6 *Id.*

7 U.S. Dep't of State, Country Report on Human Rights Practices in Tajikistan 2 (2007), http://www.state.gov/g/drl/rls/hrrpt/2007/100621.htm.

8 Amnesty Int'l, Tajikistan – Amnesty International Report 2007 1 (2007), http://www.amnesty.org/en/region/ tajikistan/report-2007.

9 Human Rights Watch, Tajikistan – Events of 2008 3 (2008), http://www.hrw.org/en/node/79352.

Ravil Mingazov

Of the eight Russian men originally imprisoned in Guantánamo, Ravil Mingazov is the last one remaining. He left Russia because he suffered from the religious persecution of Muslims prevalent there, which has only worsened in the intervening years.[10] In 2004, the U.S. transferred the seven other Russian detainees to Russia, where they were immediately charged with criminal conduct and committed to prison. While in prison, and *despite* diplomatic assurances given to the U.S. government that they would be treated humanely, "[s]ome endured mistreatment in detention that amounted to torture" and continued to be "hounded and abused" by Russian law enforcement upon their release.[11]

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[10] *See, e.g.*, U.S. Dep't of State, *Country Report on Human Rights Practices in Russia 1 (2007)*, http://www.state.gov/g/drl/rls/hrrpt/2007/100581.htm.

[11] *See* Human Rights Watch, *The Stamp of Guantánamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, 19(2) 3 (March 2007), http://www.hrw.org/reports/2007/russia0307/.

Part of the Executive's "assessment" that a detainee will not face torture upon transfer turns on such diplomatic assurances. *See* Gov't App. 104-06 (Prosper Decl. at ¶¶8-9); Gov't App. 110-11 (Waxman Decl. ¶¶6-7). Yet, diplomatic assurances from notorious human rights abusers, such as the countries' of *amici*'s citizenship, are inherently unreliable and only underscore "the fact that . . . there is clearly an acknowledged risk of torture and ill-treatment." Council of Europe, Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21-23, 2004, CommDH(2004)13 at ¶ 19 (July 8, 2004). For these reasons, the U.N. Committee Against Torture has specifically instructed

Continued on following page

Ahmed Belbacha, Abdul Aziz Naji and Other Algerians

Many of the seven Algerian detainees, including *amici* Ahmed Belbacha and Abdul Aziz Naji, fear for their safety in the event they are repatriated to Algeria. Historically, Algeria has immediately detained each prisoner that the U.S. has transferred to Algeria, including seven men returned in 2008.[12] Suspected terrorists are dealt with harshly in Algeria, where torture, abuse and long-term incommunicado detention is prevalent.[13] *Amicus* Belbacha, who was recently convicted *in absentia* by an Algiers

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Continued from previous page
that "[w]hen determining the applicability of its *non-refoulement* obligations under article 3 of the Convention, the [United States] should only rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions." U.N. Comm. Against Torture, *Conclusions and Recommendations to U.S.*, ¶21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

[12] Amnesty Int'l 2009 Annual Report for Algeria (2009), http://report2009.amensty.org/en/regions/middle-east-north-africa/algeria.

[13] *See* U.S. Dep't of State, *Country Report on Human Rights Practices in Algeria* (2008), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119112.htm; *Briefing: Amnesty International opposes forcible return to Algeria of Algerian nationals detained by US authorities at Guantánamo Bay, Cuba*, Sept. 18, 2009, en/library/infor/ MDE.28/006/2009/en at 4 (despite laws prohibiting torture, "[t]orture and other forms of ill-treatment against individuals suspected of terrorism take place in Algeria in a climate of virtually total impunity.").

court for belonging to an "overseas terrorist group,"[14] has presented the district court with evidence demonstrating his particular reasons to fear torture upon transfer.[15] *Amicus* Naji, who has been cleared for transfer from Guantánamo, has a similarly precise fear of persecution. Algerian officials who visited him in Guantánamo suggested, falsely, that he could be a member of Groupes Islamiques Armés (GIA), a militant Algerian organization, whose suspected members are dealt with harshly.[16]

Maasoum Abdah Mouhammad, Abdul Hadi Omer Mahmoud Faraj and Other Syrians

Approximately seven Syrian nationals, including *amici* Maasoum Abdah Mouhammad and Abdul Hadi Omer Mahmoud Faraj, fear for their safety in the event they are repatriated to Syria. Syria is a repressive state with a deplorable record of human rights abuses, including the pervasive use of torture and physical abuse (sometimes resulting in death).[17]

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[14] *See Algeria Court Sentences Guantánamo Detainee Seeking Asylum in US*, 2009/11/algeria-court-sentences-Guantánamo.php.

[15] He filed this evidence under seal in a motion to the district court in order to protect himself from retribution by the Algerian government. *Belbacha v. Bush*, No. 05-2349 [Dkt. No. 26] (D.D.C. July 26, 2007).

[16] *See supra* note 13.

[17] *See* U.S. Dep't of State, *2008 Human Rights Report: Syria* 1-12 (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119127.htm.

Syrian detainees face a grave risk of torture merely because of their detention at Guantánamo. Suspected terrorists in Syrian custody were "subject to torture and mistreatment,"[18] and this "[t]orture and other ill-treatment [was] committed with impunity;" military police are reported to have killed at least 17 detainees.[19] Moreover, as an ethnic Kurd, Mr. Mouhammad presents specific facts that heighten his risk of torture. A stateless minority in Syria, Kurds suffer persecution[20] and state-sponsored violence, including in Mr. Mouhammad's home town of Al-Qameshli.[21]

Abu Abdul Rauf Zalita and Abdul Hamid Al-Ghizzawi

Amici Abu Abdul Rauf Zalita and Abdul Hamid Al-Ghizzawi are Libyan citizens who have spent a significant portion of their adult lives fleeing persecution at the hands of Colonel Muammar Al-Qadhafi's notoriously abusive regime. They face a grave risk of persecution, torture and extrajudicial

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18 *Id.* at 19.

19 Amnesty Int'l, *Human Rights in Syrian Arab Republic* 1 (2009), http://www.amnesty.org/en/region/syria/report-2009.

20 Amnesty Int'l, *Amnesty International Report 2009 – Syria*, 317 (2009), http://thereport.amnesty.org/eng/Regions/Middle-East-and-North-Africa/Syria.

21 Human Rights Watch, *Syria: Address Grievances Underlying Kurdish Unrest*, Mar. 19, 2004, http://hrw.org/en/news/2004/03/18/syria-address-grievances-underlying-kurdish-unrest.

assassination if transferred there. Torture in Libyan prisons is "routine[]"[22] and includes:

> chaining prisoners to a wall for hours; clubbing; applying electric shock; applying corkscrews to the back; pouring lemon juice in open wounds; breaking fingers and allowing the joints to heal without medical care; suffocating with plastic bags.[23]

One former CIA detainee repatriated to Libya, Shaykh al Libi, recently died in Libyan prison under suspicious circumstances.[24]

Rafiq bin Bashir bin Jallul Alhami, Mohammed Abdul Rahman, and Other Tunisians

Eight Tunisians, including *amici* Rafiq bin Bashir bin Jallul Alhami and Mohammed Abdul Rahman are detained at Guantánamo Bay and fear repatriation to their home country. The State Department has documented reports of torture and

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22 U.S. Dep't of State, Country Reports on Human Rights Practices– Libya -2006 2 (March 6, 2007), http://www.state.gov/g/drl/rls/hrrpt/2006/78858.htm.

23 U.S. Dep't of State, 2008 Human Rights Report: Libya 2 (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119121.htm.

24 Peter Finn, *Detainee Who Gave False Iraq Data Dies in Prison in Libya*, WASH. POST, May 12, 2009.

other abuse by Tunisian security forces against detainees,[25] including the use of:

> sleep deprivation; electric shock; death threats; submersion of the head in water; beatings with hands, sticks, and police batons. . . . threatened and actual sexual assault against prisoners' wives to extract information, intimidate, and punish.[26]

Tunisian officials routinely refuse to register complaints or investigate allegations of torture, or provide victims with medical care until evidence of abuse has disappeared.[27]

Indeed, the Tunisian government has reportedly tortured and abused two Tunisian detainees repatriated from Guantánamo on June 17, 2007, Abdellah Ben Omar al Hajji and Lufti Ben Swei Lagha, *despite* contrary diplomatic assurances offered to the U.S. Government.[28] Tunisian terror suspects who

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25 U.S. Dep't of State, *2008 Human Rights Report: Tunisia* 2 (Feb. 25, 2009), http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119128.htm.

26 *Id.* *See also* Human Rights Watch, *2009 World Report* 518 (2009), http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

27 *Id.*

28 Human Rights Watch, *Ill-Fated Homecomings: A Tunisian Case Study of Guantánamo Repatriations*, HUMAN RIGHTS

Continued on following page

were forcibly repatriated from Italy, France, Egypt, and other nations have also reportedly experienced torture, prolonged incommunicado detention, and other inhumane treatment.[29] Moreover, due to his grave health conditions, Mr. Rahman presents specific facts that demonstrate an individual fear of ill-treatment and death upon repatriation to Tunisia.[30]

II. BY PERMITTING EXECUTIVE FIAT TO REPLACE INDIVIDUALIZED CONSIDERATION OF CORE HABEAS CLAIMS AGAINST TRANSFER, THE COURT OF APPEALS' DECISION UNDERMINES SEPARATION OF POWERS PRINCIPLES AND THREATENS TO SUBJECT NUMEROUS DETAINEES TO GRAVE HARM.

A. The Judiciary Must Play a Role in Checking Executive Transfer Decisions Because They Implicate Individual Rights.

The Government advances here the same version of Executive preeminence this Court rejected in

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WATCH 19(4), 3 (Sept. 2007). *See also* Jennifer Daskal, *A Fate Worse than Guantánamo*, WASH. POST (Sept. 2, 2007).

[29] Amnesty Int'l, *Tunisia: In the Name of Security: Routine Abuses in Tunisia*, 29-33 (June 23, 2008), http://www.amnesty.org/en/library/info/MDE20/0007/2008/en.

[30] *See* Memorandum Order 3, *Alhami v. Bush*, No. 05-C-359 (GK) (D.D.C. Oct. 2, 2007) (order granting permanent injunction) (Dkt. 58).

Hamdi and *Boumediene*. In *Hamdi*, the Executive argued that any "individual process" or "factual exploration" by the judiciary regarding the Executive's bases for detaining a so-called "enemy combatant" was categorically impermissible in light of a "respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making." 542 U.S. at 527. The Executive demanded that this Court accept the facial validity of a Defense Department official's declaration, which purported to resolve the very question presented for judicial determination – whether Hamdi was in fact a combatant. *Id.* at 527-28 (instructing Court to "*assume the accuracy* of the Government's articulated basis for Hamdi's detention") (emphasis added).

Eight Justices of the Court rejected this position as an inversion of separation of powers. *See Hamdi*, 542 U.S. at 536-37 (plurality opinion); *id.* at 541 (Souter, J., concurring); *id.* at 564 (Scalia, J., dissenting). While acknowledging that "core strategic matters of warmaking" belong to the political branches, *id.* at 531, the plurality emphasized that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 535-6. Whatever marginal burden such inquiry would place on the Executive, there must remain "a basic system of independent review." *Id.*

Similarly, in *Boumediene*, the Executive contended that any judicial inquiry as to the lawfulness of a petitioner's detention should be limited to a constricted and deferential review of its own judgment –

i.e., the conclusions of the Combatant Status Review Tribunal administrative process. *See Boumediene*, 128 S. Ct. at 2262. But the Court concluded that such limited review, even when performed in a "wartime" setting, was an inadequate substitute for the core protections of habeas corpus because it had precluded the "detainees' ability to rebut the factual basis for the Government's assertion that he is an enemy combatant." *Id.* at 2269; *see also id.* at 2273 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court."). Judicial review of the Executive's factual and legal basis to detain is necessary to "call the jailer to account," 128 S. Ct. at 2247, and to maintain the "'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* (quoting *Hamdi*, 542 U.S. at 536).

As the Court of Appeals rightly concluded here, judicial orders barring transfer constitute a core attribute of habeas relief. *Kiyemba*, 561 F.3d at 513 (citing, *inter alia*, *INS v. St. Cyr*, 533 U.S. 289, 305-08 (2001); *In re Bonner*, 151 U.S. 242, 255-56 (1894); *McMahon*, 127 U.S. 457, 462 (1888)); *see also Kiyemba*, 561 F.3d at 523 (Griffith, J., concurring in part and dissenting in part).[31] Given that premise, the Court of Appeals' ultimate conclusion categorically barring judicial review is untenable.

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[31] *See generally* Brief of Legal Historians and Experts in Habeas Corpus as *Amici Curiae* in Support of Petitioners, *Kiyemba v. Obama*, No. 09-581 (Dec. 14, 2009).

The Executive's wartime and foreign relations powers invoked here, *see* Supp. Br. for Appellants, 21-23, *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. Aug. 21, 2008) are no broader than the Executive's Commander-in-Chief power repeatedly invoked in *Hamdi* and *Boumediene*. As such, the judiciary no more has to accept the Executive's unilateral and potentially self-serving "assessment of the likelihood a detainee will be tortured" upon transfer, *Kiyemba*, 561 F.3d at 515,[32] let alone a general "Government policy" against transfers to torture, *id.* at 514, than it is obligated to accept the Executive's assessment that a detainee is lawfully detained, *compare Hamdi*, 542 U.S. at 537, or is detained pursuant to an purportedly valid "Government policy" concerning

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[32] In *Hamdi*, this Court refused to accept as conclusive the declaration of the Special Advisor to the Undersecretary of Defense for Policy on the question of a habeas petitioner's combatant status. *See Hamdi*, 542 U.S. 537. Yet the Court of Appeals here accepts a four-year old declaration by the former Ambassador at Large for War Crimes Issues, about the Government's good-faith efforts to avoid transferring any detainee to torture, as conclusive proof that an individual petitioner in 2009 would not suffer torture upon transfer regardless of his particular circumstances. Proclamation cannot substitute for proof. *See Al Odah v. United States*, 559 F.3d 539, 545 (D.C. Cir. 2009) (rejecting Government's assertion that certain redacted information was immaterial because a "naked declaration cannot simply resolve the issue"); *Parhat v. Gates*, 382 U.S. App. D.C. 233, 248 (D.C. Cir. 2008) (observing "the fact that the government 'has said it thrice' does not make the allegation true") (quoting Lewis Carroll, *The Hunting of the Snark* (1874)).

the rights of detainees. *Compare Kiyemba*, 561 F.3d at 525 (Griffith, J., concurring in part and dissenting in part) ("Critical to ensuring the accuracy of the government's representations is an opportunity for the detainees to challenge their veracity. The rudimentaries of an adversary proceeding demand no less."). No theory of separation of powers could relegate the Judicial Branch, as the Court of Appeals does, to a rubber stamp of Executive proclamation. Viewing it as such "serves only to *condense* power into a single branch of government." *Hamdi*, 542 U.S. at 535 (plurality opinion).

Similarly, undifferentiated assertions about the burdens judicial inquiry will place on the Executive's ability to transfer detainees or to conduct foreign relations cannot excise the judiciary from our separation of powers scheme. *Boumediene*, 128 S. Ct. at 2261 ("compliance with any process requires some incremental expenditure of resources"); *Hamdi*, 542 U.S. at 535 (plurality opinion) (threats to military operations do not categorically trump detainee's "core rights to challenge meaningfully the Government's case."). As this Court has recognized, district courts are fully competent to undertake a fact-finding approach that is "prudent and incremental," *Hamdi*, 542 U.S. at 535, and to make "accommodations," *Boumediene*, 128 S. Ct. at 2276, to particularly sensitive concerns presented by the Executive. Ultimately, the Executive's decision to transfer a petitioner pursuant to law is "vindicated, not eroded when confirmed by the judicial branch." *Boumediene*, 128 S. Ct. at 2277.

The wisdom of this Court's previous refusal to validate Executive fiat has been borne out dramatically in subsequent proceedings. On remand from *Boumediene*, the district courts have found an insufficient factual or legal basis to detain in a remarkable thirty-one out of thirty-nine cases.[33] In other words, the Executive's assessment, but for judicial review, would have been incorrect 80% of the time.[34] There is no reason for the Court to believe an Executive assessment regarding the likelihood of torture would be any more reliable.

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[33] *See* Daphne Eviatar, *Another Gitmo Detainee Wins in Federal Court; Score Is Detainees 31, United States 8*, WASH. INDEP., Nov. 20, 2009.

[34] The district courts' reviews of the evidence should give this Court considerable pause as it evaluates the authoritativeness of Executive assessments in the transfer context. *See, e.g.*, *Al Rabiah v. Obama*, Civ.A. No. 02-828 (CKK), 2009 WL 3083077, *1, 19 (D.D.C. Sept. 17, 2009) (characterizing Government's cumulative evidence as "surprisingly bare" and certain inferences from evidence "incredible" or "def[ying] logic"); *Al-Adahi v. Obama*, Civ.A. No. 05-280 (GK), 2009 WL 2584685, *15 (D.D.C. Aug. 21, 2009) (observing Government allegations "cannot rest on mere conjecture, with no hard evidence to support it"); *Awad v. Obama*, 646 F. Supp. 2d 20, 27 (D.D.C. 2009) (Government's evidence "gossamer thin"); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 57 (D.D.C. 2009) (rejecting host of evidence as unreliable, "equivocal and lacking in detail").

B. The Court's Narrow Ruling in *Munaf* Does Not Categorically Preclude Judicial Review of a Proposed Involuntary Transfer.

The Court of Appeals' conclusion that the judicial branch has no role in protecting individuals from involuntary transfer to torture, *Kiyemba*, 561 F.3d at 514, represents an extraordinary and untenable expansion of this Court's careful, fact-specific ruling in *Munaf*. Petitioners there were American citizens who, after voluntarily travelling to Iraq and allegedly committing terrorist acts there, were detained on Iraqi soil by United States military forces during an ongoing military conflict, in anticipation of trial by the Iraqi government. 128 S. Ct. at 2214-16; *see also id.* at 2228 (Souter, J., concurring) (emphasizing the eight facts upon which the Court's narrow ruling was based). The Court unanimously rejected petitioners' request, made under the guise of the court's authority to order habeas "release," for an "order requiring the United States to shelter them from the sovereign government seeking to have them answer for alleged crimes committed within the sovereign's borders." *Id.* at 2221. Such an interference with Iraqi sovereign authority, the Court observed, would have violated international law. *See id.* at 2221-22 (citing *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)).

Munaf does not stand for the proposition that U.S. courts can *never* entertain challenges to the Executive's decision to transfer a detainee involuntarily, despite a fear of torture. *First*, the Court's defer-

ence to the Executive in *Munaf* must be read in light of the Court's particular, repeated concerns over respecting the territorial sovereignty of the host nation[35]—concerns which the present Petitioners and *amici* detainees, transferred to Guantánamo eight years ago by the U.S. government, do not implicate. Unlike the *Munaf* petitioners, *amici* and Petitioners are essentially refugees, a class of persons long entitled to legal protection and familiar to the judiciary.

Second, acceptance of the Court of Appeals' reading of *Munaf* would result in a sweeping reordering of the Executive and judiciary's established roles in cases involving a feared transfer to torture.[36] Indeed, this reading suggests that *Munaf*'s careful

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[35] *Munaf*, 128 S. Ct. at 2221 ("Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil"); *id.* at 2224 ("a sovereign's recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders"); *see also id.* at 2222 ("a nation state reigns sovereign within its own territory"); *id.* at 2225 (citing rule that "exemptions from territorial jurisdiction . . . are rather questions of policy than of law" in finding courts unsuited to challenge transfer).

[36] John T. Parry, *International Extradition, the Rule of Non-Inquiry and the Problem of Sovereignty* 44 (Nov. 17, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1508019 (*Munaf* cannot be read outside its particular circumstances to foreclose habeas review of transfers because such a categorical reading "would undermine fundamental due process protections against arbitrary seizure, detention, absence of process, and infliction of harm, and it would effectively create an executive prerogative to deal with the bodies of people according to the needs of foreign policy.").

and restrained decision nullified U.S. statutory implementations of the Convention Against Torture and the Refugee Convention and overruled the myriad cases every year in which courts block the Executive's proposed transfer based on a substantial risk of torture. *See discussion infra* at 25-26.[37] Moreover, because involuntary transfer to a foreign country has long been considered a form of custody for purposes of habeas corpus, *Chin Yow v. United States*, 208 U.S. 8, 12 (1908); *Jones v. Cunningham*, 371 U.S. 236, 238-241 (1963), a holding that courts may never question such an involuntary transfer would suspend the habeas writ for an entire class of detainee claims—which a *court* certainly may not do. *Boumediene*, 128 S. Ct. at 2262 (court may not effect a "de facto suspension" of habeas corpus); *Hamdi*, 542 U.S. at 562 (Scalia, J., dissenting) (habeas writ may only be suspended by Congress).

Rather, *Munaf* presumes that habeas courts will examine the national security and foreign policy concerns in each case and make an individual determination as to the propriety of issuing the writ. This is precisely what the Court did in *Munaf*. The Court considered the competing evidence on the risk of torture and determined it was "not the extreme case" where the Executive transfers a detainee de-

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[37] The Court of Appeals' reading of *Munaf* would also contradict the Court's explicit statement that it was *reserving* the question of whether the domestic statutory implementation of the Convention Against Torture – a claim not raised in the case – would authorize judicial review of an Executive transfer decision. *See Munaf*, 128 S.Ct. at 2226 n.6.

spite a recognized risk of torture,[38] 128 S. Ct. at 2226; consequently, and given its concerns over Iraq's territorial sovereignty, the Court found habeas relief was inappropriate and could not justify the injunction under review. *Id.* at 2223-26; *see also id.* at 2228 (Souter, J., concurring) (explaining Court's decision does not foreclose relief where "the probability of torture is well documented, even if the Executive fails to acknowledge it."). The Court of Appeals' holding forecloses the kind of review contemplated and performed in *Munaf*. *Amici* seek only an opportunity to present evidence (including evidence from the State Department, *see supra*), which might rebut the Executive's generalized (and empirically disproven) "assessment" that no risk of torture exists for a particular detainee. Without notice, there is no opportunity to ascertain whether a given petition presents an "extreme case." Indeed, without notice, such "extreme" behavior becomes all the more possible.

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[38] Specifically, while the Executive conceded that torture exists in some sectors of the Iraqi justice system, *i.e.*, the Ministry of the Interior, these petitioners were in fact to be transferred to the Justice Ministry, which the State Department had concluded "generally met internationally accepted standards for basic prisoner needs." *Id.* at 2226 (internal quotations omitted). Because the State Department supported the judgment of the military, the Government was "speak[ing] with one voice in this area." *Id.*

C. Neither the Rule of Non-Inquiry Nor the Separation-of-Powers Principles Underlying It Render the Judiciary Incompetent to Undertake Targeted Inquiries into Risk of Torture Upon Transfer.

Contrary to Judge Kavanaugh's concurring opinion, the Court of Appeals' overbroad reading of *Munaf* finds no support in the rule of non-inquiry or any separation-of-powers principles underlying it. *Cf. Kiyemba*, 561 F.3d at 517. First, because the rule of non-inquiry arises by implication exclusively from the formal extradition process, its underlying principles mandate that the rule be limited to that context. *See generally* M. Cherif Bassiouni, *The Law of International Extradition: United States Law and Practice* 604-42 (5th ed. 2007).[39] Moreover, the sepa-

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[39] Extradition, which must be pursued by statute, *see* 18 U.S.C. § 3184, deliberately divides responsibility between a judicial officer, who determines whether the statute permits transfer, and the Secretary of State, who is thereafter authorized by statute to accept or decline or attach conditions to the proposed extradition. *See* 18 U.S.C. § 3196; *United States v. Kin Hong*, 110 F.3d 103, 112 (1st Cir. 1997). The judiciary broadly defers to the Secretary of State's discretion in this extradition context only because Congress has expressly authorized such discretion. *Valentine v. United States* ex rel. *Neidecker*, 299 U.S. 5, 8-9 (1936) (extradition power "is not confided to the Executive in the absence of a treaty or legislative provision"). *Amici* and other Guantánamo detainees have not been afforded the statutory guarantee of judicial review that accompanies the formal extradition process.

ration-of-powers principles attributed to the rule of non-inquiry by the Court of Appeals primarily preclude judicial review of the procedural protections available in foreign judicial systems.[40] This is so in part because foreign sovereigns are not bound by U.S. constitutional norms, *see Neely v. Henkel*, 180 U.S. 109, 123 (1901), and in part because courts are not always well-suited to opine broadly about the comparative qualities of various foreign judicial systems, *see, e.g., United States v. Smyth*, 61 F.3d 711, 714 (9th Cir. 1995).

Petitioners and *amici* raise no such challenge here. Rather, they seek to present particular individualized facts which highlight the risk of *torture* they face upon transfer and to ensure compliance with the Executive's obligations under the Due Process Clause and the Convention Against Torture. United States courts undertake identical inquiries hundreds of times each year pursuant to the Refugee Convention, *see* 8 U.S.C. § 1101(a)(42)(A), *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (alien eligible for asylum upon demonstration of "well-founded fear of persecution" in his home country); *Ahmed v. Keisler*, 504 F.3d 1183, 1192, 1199 (9th Cir. 2007) (finding well-founded fear based on "totality of the circumstances"), or the Convention Against Torture, *see* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242 (U.S. shall not involuntarily return person to country where there are "substantial grounds" for finding a

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[40] *See* Parry, *supra* note 36 at 14-18.

risk of torture); *see also* 8 U.S.C. §1252(a); *Owino v. Holder*, 575 F.3d 956, 958 (7th Cir. 2009) (confirming jurisdiction of federal courts to review denial of CAT claim). As part of those inquiries, courts are fully competent and authorized to enjoin a transfer or deportation on grounds it is unsafe without having to consider the Government's "foreign policy interests." *Mironescu v. Costner*, 480 F.3d 664, 672-73 (4th Cir. 2007). In cases such as *amici*'s, courts are "required to answer only the straightforward question of whether a fugitive would likely face torture in the requesting country." *Id.*

Indeed, courts applying the rule of non-inquiry, including courts cited by the Court of Appeals, recognize an exception in severe cases for objections to transfer based on a fear of torture. *See Mironescu*, 480 F.3d at 673; *Kin-Hong*, 110 F.3d at 112; *Prushinowski v. Samples*, 734 F.2d 1016, 1019 (4th Cir. 1984); *accord Hoxha v. Levi*, 465 F.3d 554, 564 n.14 (3d Cir. 2006). Torture is rightly considered *sui generis* and represents a concern manifestly distinct from concerns related to procedural variations among criminal justice systems. *See In re Burt*, 737 F.2d 1477, 1485 n.11 (7th Cir. 1984)).

In any event, discretion granted to the Executive by this common law rule, as in any context, must be ultimately limited by the Constitution. *Mironescu*, 480 F.3d at 670 (Executive lacks the discretion to extradite a fugitive when extradition would violate his constitutional rights); *see also Wang v. Reno*, 81 F.3d 808, 811-12 (9th Cir. 1996) (petitioner may enjoin deportation in *habeas* context based on

substantive due process claims against U.S. government actors); *Burt*, 737 F.2d at 1482-85 (recognizing habeas challenges to transfer based on procedural and substantive due process grounds).

* * *

Obligating the Executive Branch to provide notice of a proposed transfer so that *amici* and other Guantánamo detainees may have an opportunity to present particularized evidence supporting a fear of torture "meddles little, if at all" in the Executive's foreign relations or Commander-in-Chief power. *Hamdi*, 542 U.S. at 535. The Court of Appeals' decision reduces the judiciary to a rubber stamp. The Court should grant *certiorari* to restore the "delicate balance of governance" among the three branches and to reassert the judiciary's role in protecting individuals from grave harm.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of *certiorari* should be granted.

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Supreme Court of the United States

JAMAL KIYEMBA, et al.,
Petitioners,

v.

BARACK H. OBAMA, President of the United States, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF LEGAL HISTORIANS AND HABEAS CORPUS EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Eric M. Freedman, *Milestones in Habeas Corpus: Part I Just Because John Marshall Said it, Doesn't Make it So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 Ala. L. Rev. 531 (2000) 14-15

Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575 (2008) 4, 5, 6, 7, 10, 12, 14, 15, 16, 17

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Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527 (1960) 11, 15, 16

James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS v. St. Cyr, 16 Geo. Immigr. L.J. 485 (2002) 15

George Van Cleve, *Somerset's Case and Its Antecedents in Imperial Perspective*, 24 L. & Hist. Rev. 601 (2006) 12

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of legal history or experts in habeas corpus with particular expertise in English legal history prior to 1789 and/or early American legal history. As in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), *amici* have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the common law writ of habeas corpus. *See, e.g.*, *id.* at 2244 ("[T]o the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.").

Amici are impelled to support certiorari in this case in light of the Court of Appeals' conclusion that the petitioners are not entitled to use habeas corpus as a means of objecting to their transfer beyond the jurisdiction of the habeas court. *See* Pet. App. A. As the brief that follows suggests—and as the dissenting judge in the Court of Appeals concluded, *see id.* at 27a (Griffith, J., concurring in the judgment in part and dissenting in part) ("Since at least the

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1. The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond its reach where they would be subject to continued detention on behalf of the government.")—the pre-revolutionary English experience was decidedly to the contrary.

SUMMARY OF ARGUMENT

This Court has repeatedly suggested that, "at the absolute minimum," the Constitution's Suspension Clause, U.S. Const. art. I, § 9, cl. 2, protects the writ of habeas corpus "as it existed in 1789." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)). Thus, the scope of habeas corpus in English courts at the time of the Founding necessarily informs the scope of the writ protected by the Constitution, and, in light of *Boumediene*, 128 S. Ct. 2229, the scope of relief available to non-citizens detained at Guantánamo Bay.

A review of historical sources reveals that the writ of habeas corpus "as it existed in 1789" was available to individuals who sought to challenge their transfer beyond the jurisdiction of the habeas court. Because the writ of habeas corpus derived from the royal prerogative, King's Bench often issued writs that were not based upon established precedent. Analytically, this means that the justices were empowered to examine detention in all forms, including cases concerning transfer. And empirically, the King's Bench in fact exercised this expansive jurisdiction in cases where the petitioner sought to challenge his transfer beyond the court's process.

Moreover, these common law powers both predated and survived the Habeas Corpus Act of 1679. As is now familiar, the Act was itself titled "An Act for the better securing the Liberty of the Subject, and for the Prevention of Imprisonment beyond the Seas," and expressly forbade "the shipment of prisoners to places where the writ did not run or where its execution would be difficult," *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting). While the Act thereby reinforced the conclusion that a fundamental concern of habeas corpus was the prevention of unlawful extrajudicial transfer, the common law practice of King's Bench both before and subsequent to the Act's codification independently provided authority at least as broad as—if not far broader than—the statute. Such authority unquestionably included the use of habeas corpus to prevent a prisoner's transfer outside the jurisdiction of King's Bench.

This distinction is significant because it highlights the extent to which the English experience that necessarily informed the Founders' understanding of the scope of habeas corpus was hardly limited to cases under the Habeas Corpus Act of 1679. To the contrary, that experience included a robust common law writ of habeas corpus to which King's Bench routinely resorted when the statutory writ proved either unavailable or ineffective. As such, it is of little moment that the Habeas Corpus Act of 1679 only protected prisoners from transfer beyond the jurisdiction by prohibiting the transfer itself; the common law writ continued to furnish King's Bench—as it always had—with an

opportunity to inquire into the transfer before it took place, an authority that was repeatedly exercised. Both statutory and common law practice conclusively establish that "[t]he bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas," Pet. App. 28a (Griffith, J., concurring in the judgment in part and dissenting in part). The Court of Appeals' conclusion to the contrary misunderstands the writ protected by the Suspension Clause in these key respects, and must not be left intact.

ARGUMENT

I. THE COMMON LAW POWERS OF ENGLISH COURTS TO ISSUE WRITS OF HABEAS CORPUS INCLUDED THE USE OF THE WRIT TO PREVENT TRANSFER TO UNLAWFUL OVERSEAS DETENTION.

As Justice Kennedy correctly summarized in *Boumediene*, the writ of habeas corpus *ad subjiciendum et recipiendum*[2] "was in its earliest use a mechanism for securing compliance with the King's laws." 128 S. Ct. at 2244; *see also* William F. Duker, A Constitutional History of Habeas Corpus 12–23 (1980) (describing habeas's "humble origins"). Subsequently, however, in the period leading up to the end of the sixteenth century (and the beginning

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2. On the different forms of the writ available at common law, see Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 598 n.50 (2008).

of the seventeenth), "it became clear that by issuing the writ of habeas corpus common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner." *Boumediene*, 128 S. Ct. at 2245.

Indeed, "[t]he single most important feature of habeas corpus jurisprudence, as it emerged in the seventeenth century, did not concern *how* King's Bench justices decided the fate of prisoners." Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 600 (2008). Rather, "[i]t concerned the fact *that* the justices decided their fate, regardless of who locked them up. Thus the great importance of habeas corpus lay in its extension to all institutions and courts by an insistent King's Bench, whose justices made use of all the powers available to them in doing so." *Id.* Analytically, the breadth of the habeas corpus jurisdiction exercised by King's Bench during this period necessarily encompassed the authority to prevent transfer of a prisoner beyond the court's process. And empirically, the justices exercised such power.

a. The Power of King's Bench To Issue Writs of Habeas Corpus Derived from the Royal Prerogative.

That the writ traced its roots and owed its power to the royal prerogative is critical in understanding the functional—indeed, the effectively *equitable*—nature of the authority exercised by King's Bench in the decades leading up to the

Habeas Corpus Act of 1679. As Professors Halliday and White have explained, "Although habeas corpus was a common law writ, subjects' pleas to use it were often based less on common law norms than on appeals to what we might call the equity of the writ." Halliday & White, *supra*, at 608. Moreover, "The key to the prerogative writs lay in the court's omnipotence when using them, and that omnipotence primarily stemmed from their equitable character: their embodiment of the King's mercy." *Id.*; *see also Bourn's Case*, 79 ENG. REP. 465, 467 (K.B. 1619) ("[T]his writ is a prerogative writ, which concerns the King's justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned . . . and to dispute it is not to dispute the jurisdiction, but the power of the King and his Court, which is not to be disputed . . . .").[3]

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3. The conclusion that habeas implicated the *equitable* powers of King's Bench is bolstered by two different sets of historical evidence: that "the justices regularly rendered judgments that did more than answer the question about the propriety of the arrest warrant, ostensibly the only matter raised by the writ," and that "King's Bench often ignored its own ostensible rules controlling process," especially the principle that the return to a writ of habeas corpus had to be taken as accurate on its face. *See* Halliday & White, *supra*, at 610.

b. As a Result, King's Bench Often Issued Writs that Were Not Based Upon Established Precedent, but that Nevertheless Empowered the Justices To Examine Detention in All Forms.

More than just affecting how this period is accurately described historically, the increasing "omnipotence" of King's Bench when it came to habeas corpus had contemporaneous consequences as well, for it left the justices in a better position to adapt the writ to accommodate novel jurisdictional issues as they arose (and proliferated) throughout the mid-seventeenth century, especially in the period leading up to the English Civil War, the Interregnum, and the Restoration. Thus, as the court encountered imprisonment orders issued by new governmental officers or agencies, or from individuals imprisoned in places testing the geographic reach of its process, King's Bench showed no reluctance to continue issuing writs of habeas corpus. *See, e.g.*, Halliday & White, *supra.* at 611–12, 621 n.130.

Moreover, the means by which King's Bench adapted the writ is telling: rather than articulate circumstance-specific jurisdictional rules, King's Bench issued the writ throughout this period on demonstration of a prima facie cause for issuance, requiring the production of the prisoner (and putting the disposition of the prisoner's claim under its authority) even in cases without clear precedent. The jurisdictional consistency in the face of factually varied circumstances reflected the increasingly

prevalent assumption that the merits of a habeas claim were to be evaluated by the King's Bench itself, and only once it had seized itself of both legal and physical custody of the prisoner, who was then committed to the custody of the King's Bench's marshal.[4]

Thus, habeas corpus became centered upon a general principle rather than a set of common law rules. That principle, derived from the royal prerogative, was that King's Bench could review imprisonment orders without respect to either the specific source of the authority to imprison or the factual circumstances under which the imprisonment took place. And while the result in a majority of cases was that the petitioner was bailed *pendente lite* or discharged, the critical point is the expansive *jurisdiction* of King's Bench to reach the merits. *See, e.g.*, Duker, *supra*, at 62 ("From the fourteenth to the seventeenth century, habeas corpus was a convenient weapon wielded by the courts of England in their maneuvers to increase and to safeguard their jurisdictions.").[5] Thus, the court's power to issue the

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4. On the significance of having the prisoner committed to the custody of King's Bench through its marshal, see Paul D. Halliday, Habeas Corpus: England to Empire 59 & 357 n.92 (forthcoming Mar. 2010).

5. To enforce its (expanding) jurisdiction, King's Bench during the same period began inserting subpoena clauses into successive writs of habeas corpus—or imposing fines or using attachments for contempt—thereby raising the stakes should the recipient of the writ decline to comply. And although the Habeas Corpus Act of 1679 would provide statutory authority for such measures, the practice was widespread by the early years of the seventeenth century through the common law

writ depended little if at all upon the merits of the petitioner's claim; it was only once the petitioner was properly before King's Bench that the justices could—and would—reach the merits. As Professor Halliday has explained,

> The most significant aspect of Somerset's Case,[6] as in POW cases, was not the result, but that it was a case at all. In Schiever's case,[7] the court had maintained its jurisdiction over POWs by deciding whether that Swede truly counted as a POW. Similarly, for James Somerset, the fact of the writ's issuance was of the first importance. King's bench issued the writ by reasoning not from precedents, but from the writ's central premise: that it exists to empower the justices to examine detention in all forms. . . . There were no real precedents, but there was nothing any more surprising about using the writ for a slave trapped on a ship in the Downs than there was for a sailor trapped on a ship in the same waters.

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habeas process. On subpoena clauses and process by attachment for contempt, see Halliday, *supra*, at 11-14, 60–63, 83-84, 92-93 & 350-51 n.39 (forthcoming Mar. 2010).

6. 20 How. St. Tr. 1 (K.B. 1772).

7. 97 Eng. Rep. 551 (K.B.. 1759).

Paul D. Halliday, Habeas Corpus: From England to Empire 176 (forthcoming Mar. 2010).

That the power of King's Bench had so expanded during this period is perhaps most clearly apparent from the use of habeas corpus during the English Civil War, which "proved to be one of the glory periods for habeas corpus," during which "[t]he court stood up to the imprisonment orders made by many of the new officers or agencies created by Parliament to fight a war against their king." Halliday & White, *supra*, at 621 n.130. As Halliday elaborates,

> Early in the war, [King's Bench] bailed prisoners committed on the warrant of the Earl of Essex, commander of Parliament's armies, when the returns to their writs made no mention of why he imprisoned them. Shortly before the Restoration, the justices of the Upper Bench bailed Francis Lord Willoughby, former governor of Barbados and royal conspirator, from military custody at Hull.

Halliday, *supra*, at 165 (footnotes omitted); *see also id.* at 402 nn.114–15 (providing citations to the dispositions).

But specific examples of the expansion of the writ aside, the reality by the time of the Restoration was that habeas corpus had become a powerful tool through which English subjects enlisted the power of King's Bench, even in cases presenting unprecedented circumstances of imprisonment.

Insofar as the jurisdiction of King's Bench was concerned, such novelty, in the end, was entirely beside the point.

c. Exercising This Authority, King's Bench Issued the Writ on a Number of Occasions To Prevent the Transfer of an Individual Beyond the Reach of Its Process.

One important manifestation of the increasingly vast jurisdictional reach of King's Bench's habeas powers was its response to those in custody who sought to use habeas to prevent their transfer beyond the practical—if not legal—reach of the court's process. Indeed, although Justice Scalia was entirely correct in *Boumediene* that the Habeas Corpus Act of 1679 sought to eliminate such a "possibility of evading judicial review" by the "spiriting-away" of British prisoners, 128 S. Ct. at 2304 (Scalia, J., dissenting), "[m]any of the technical provisions enacted in 1679 were in actual operation by the middle 1670's as a result of reforms within the court itself," Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 539 (1960), including the use of the writ to allow King's Bench to decide the legality of such transfers.

A particularly instructive case in this regard is that of Robert Murray, a Scot imprisoned on two separate occasions in 1677—first for "defamation of his majesty and his government," and later "in order to his being sent into Scotland to be tried there according to law for several crimes." *See* Halliday,

supra, at 236. Both times, King's Bench issued the writ to allow an inquiry into Murray's deportation, and ended up bailing him rather than permit his deportation. *See id.* at 425 n.87 (citing the disposition).

Of course, as Paul Freund warned, one must be careful "to look to history for the essentials of the Great Writ, but not to one point in that history for its accidents." Brief for Respondent at 33, *United States v. Hayman*, 342 U.S. 205 (1952) (No. 23), *quoted in* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 970 & n.42 (1998). But Murray's case was no accident. Indeed, in the context of slavery, there are a number of reported instances of writs issuing to prevent the removal from England of individuals allegedly bound to slavery, the most famous of which is *Somerset's Case*, 20 How. St. Tr. 1 (K.B. 1772), in which Lord Mansfield issued the writ on the ground that slavery was unknown to English common law. *See generally* George Van Cleve, Somerset's Case *and Its Antecedents in Imperial Perspective*, 24 L. & HIST. REV. 601 (2006). To similar effect, the common law writ routinely issued in cases brought by impressed seamen to inquire into the propriety of their military induction—before they were removed to the high seas. *See, e.g.*, Halliday & White, *supra*, at 605 & n.72.

The upshot of these cases is the conclusion that habeas corpus could be—and routinely *was*—used to ensure the *ex ante* legality of an individual's transfer beyond the process of King's Bench. And while concerns over the prisoner's fate once

transferred may well have motivated the justices' disposition toward individual cases, the only means of allaying such concerns was to assert jurisdiction *ab initio*, in order to allow King's Bench to conduct an inquiry into whether such fears might be justified. Thus, while jurisdiction never turned on the particular claims the prisoner made on the merits in objecting to transfer, the assertion of jurisdiction in every case empowered King's Bench to provide remedies in those cases in which English law might prohibit the fate that would befall the petitioner if transferred.

II. THE SCOPE OF COMMON LAW HABEAS PRE-DATED AND WAS BROADER THAN THE AUTHORITY PROVIDED BY THE HABEAS CORPUS ACT OF 1679, AND CONTINUED TO EVOLVE AND EXPAND AFTER THE ACT.

a. The Habeas Corpus Act of 1679 Did Not Establish Limits on the Scope of Habeas Authority But Rather Reflected the Existing Common Law Practice, Which Continued to Evolve.

Like generations of scholars, both Justices Kennedy and Scalia in *Boumediene* emphasized the historical significance of the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, which Blackstone hyperbolically labeled "the second *magna carta*," William Blackstone, 1 Commentaries *137, and the "stable bulwark of our liberties," *id.*; *see also* The Federalist

No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citing Blackstone's discussion of the Habeas Corpus Act).

To be sure, the Act was at least partially directed to the problem of transfer beyond the reach of judicial process. After all, its full name was "An Act for the better securing the Liberty of the Subject, and for the Prevention of Imprisonment beyond the Seas," and, as Justice Scalia noted, Article XII expressly forbid "the shipment of prisoners to places where the writ did not run or where its execution would be difficult." *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting). But the focus on the language and scope of the Habeas Corpus Act of 1679 obscures the larger and more important points about the common law practice of King's Bench both before and subsequent to the Act's codification. Indeed, as Halliday and White have concluded,

> the celebrated Habeas Corpus Act merely codified practices generated by King's Bench justices. In whig histories, the statutory writ of the 1679 Habeas Corpus Act provides a moment for parliamentary self-congratulation that all but erased the significance of the role judges had played in developing the equitable dimensions of habeas corpus jurisprudence.

Halliday & White, *supra*, at 611; *cf.* Eric M. Freedman, *Milestones in Habeas Corpus: Part I Just Because John Marshall Said it, Doesn't Make it So: Ex parte* Bollman *and the Illusory Prohibition on*

the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789, 51 Ala. L. Rev. 531, 579 n.160 (2000) (noting comparable misconceptions about habeas in American jurisprudence).

A closer look at historical practice tells a different story, revealing that "[m]any of the technical provisions enacted in 1679 were in actual operation by the middle 1670's as a result of reforms within the court itself," Nutting, *supra*, at 539, and that "in the century after the passage of the Habeas Corpus Act of 1679, all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ rather than the statutory one." Halliday & White, *supra*, at 612. To take just one example from many, despite the failure of Parliament in 1758 to agree to legislation that would have remedied the perceived failure of the statutory writ to encompass challenges to impressment orders, King's Bench, under the direction of Chief Justice Lord Mansfield, routinely entertained such cases by issuing common law writs of habeas corpus. *See, e.g.*, *id.* at 612 & nn.96–97, 632 & n.163. *See generally* James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS *v.* St. Cyr, 16 Geo. Immigr. L.J. 485, 488–95 (2002).

b. Cases In Which the Writ Issued To Prevent Transfers Beyond the Process of King's Bench Predate the Habeas Corpus Act of 1679.

As discussed above, King's Bench had already used writs of habeas corpus to inquire into transfer beyond its process several years before the Habeas Corpus Act of 1679 expressly prohibited such transfers—as typified, for example, in *Murray's Case*. And since "the statutory writ was never understood . . . as *superseding* the common law habeas jurisprudence," Halliday & White, *supra*, at 631, this authority survived enactment of the Habeas Corpus Act of 1679 intact, even though the Act itself provided no comparable power.

Instead, the Act's purported innovations were targeted toward solidifying the power of the justices to issue the writ during vacation, ensuring a speedy return of the writ, and enhancing the penalties for disobedience of (or wrongful refusal to issue) the writ. *See generally* Nutting, *supra*, at 540–43. Tellingly, though, all of these authorities had routinely been exercised by King's Bench when issuing common law writs of habeas corpus long before Parliament saw fit to codify them.

While there may be debate as to the necessity of these reforms, archival evidence suggests that, after the Act, courts continued to resort to their common law powers to issue the writ in cases in which the statute may not have specifically authorized it. *See, e.g.*, Halliday & White, *supra*, at 634 n.168 ("[B]etween 1679 and 1789, the writ of

habeas corpus was treated in Anglo-American jurisprudence as sounding in common law as well as in the 1679 Act."); *see also id* at 612 n.97 ("The Act concerned the use of habeas corpus only in cases of alleged felony or treason. These wrongs dwindled as a share of habeas litigation in the eighteenth century as ever-larger numbers of writs tested detentions in which there was no allegation of wrong, such as those involving abused wives and impressed sailors.").[8]

* * *

This Court is already familiar with much of the history summarized above, especially given its more expansive presentation in *amici*'s brief on the merits in *Boumediene*. Its invocation here, though, is to emphasize a point largely neglected by this Court in *Boumediene*—and misunderstood by the authors of the majority and concurring opinions in the Court of Appeals in this case: the English experience that necessarily informed the Founders' understanding of the nature of the "privilege of the writ of habeas corpus" that Article I's Suspension Clause was designed to protect was hardly limited to cases under the Habeas Corpus Act of 1679. To the contrary, that experience included a robust common law writ of habeas corpus to which King's Bench

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8. As Halliday and White explain, "That the writ in its common law form developed new uses is evident not only from the non-felony matters to which it was put, but also from the note written on the back of each writ . . . saying whether it had issued according to the terms of the 1679 statute—a relatively rare occurrence—or by rule of the court." Halliday & White, *supra*, at 612 n.97.

routinely resorted when the statutory writ proved either unavailable or ineffective. As such, while it is significant that the Habeas Corpus Act of 1679 protected prisoners from transfer beyond the jurisdiction by prohibiting the transfer itself, *see Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting), the common law writ continued to furnish King's Bench—as it always had—with an opportunity to inquire into the transfer before it took place, and that authority was repeatedly exercised. Thus, and contrary to the conclusion of the Court of Appeals in this case, "[t]he bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas." Pet. App. 28a (Griffith, J., concurring in the judgment in part and dissenting in part). The Court of Appeals' decision to the contrary should accordingly be reversed.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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